SUPREME COURT OF THE UNITED STATES.

No. 158.

THE PACIFIC INSURANCE COMPANY, PLAINTIFF,

vs.

FRANK SOULE, COLLECTOR OF INTERNAL REVENUE.

ON A CERTIFCATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

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1 UNITED STATES OF AMERICA, *District of California:*

At a circuit court of the United States, begun and held at the city of San Francisco, for the district of California, (9th circuit,) on Thursday the 18th day of October, A. D. 1866.

Present: The Honorable Stephen J. Field, associate justice of the supreme court and presiding judge, and the Honorable Ogden Hoffman, district judge.

State of the pleadings.

THE PACIFIC INSURANCE COMPANY, plaintiff,
vs.
FRANK SOULE, defendant.

2 This is an action to recover the sum of seven thousand three hundred and sixty-five (68-100) dollars ($7,365 68-100) paid by the plaintiff, under protest, to the defendant, as collector of internal revenue.

The following are the facts stated in the plaintiff's complaint, and admitted by the defendant's demurrer.

The plaintiff is a corporation engaged in the business of insurance.

The assistant assessor of internal revenue for the district in which the plaintiff's office is situated, appointed under the act of the first of July, 1862, entitled "An act to provide internal revenue to support the government, and to pay interest on the public debt," and
3 subsequent acts upon the same subject, having demanded of the plaintiff an account or return of the amounts insured, renewed or continued, the gross amount of premiums received, and assessments collected by the plaintiff for the month of July, 1866, and the duties accruing thereon, under the provisions of section one hundred and five (105) of the act of Congress, approved June 30th, 1864, entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," and also demanded a list or return of the amount of taxes levied by section one hundred and twenty (120) of the same act, or by the amendment thereto, made by the act of July 13, 1866, upon dividends, undistributed sums, and income for the preceding
4 quarter, the plaintiff on the 31st of August, 1866, made out and delivered to said assistant assessor, in due form and properly verified, the two several lists or returns required, which showed that the amount of premiums received was the sum of $74,409, and the tax thereon, at the rate of 1½ per cent, was the sum of $1,116; and that the amount of dividends declared and net gains undistributed was the sum of $85,218, and that five per cent. thereof was the sum of $4,260 90-100, making the aggregate of tax or duty under said sections the sum of $5,376 90-100.

The amount of said premiums, dividends, and net gains, were truly stated in said lists or returns, according to their values in
5 coined money, that being the currency in which the moneys had been received by the plaintiff.

The assistant assessor then added to said amounts the alleged difference between legal tender currency and coined money during the time covered by the returns, thus making the amount of premiums, received the sum of $101,929, and 1½ per cent. thereon, the sum of $1,528 93-100, and the amount of dividends declared and net gains undistributed, the sum of $116 1/17, and five per cent. thereon the sum of $5,836 75-100; and delivered the lists, with the amounts so increased, to the defendant, who is the collector of internal revenue, under said acts of Congress, for the district in which plaintiff's office is situated.

6 The addition to the amounts shown by the original lists was made without the consent and against the protest of the plaintiff, of all which the defendant had notice.

The defendant then demanded of the plaintiff payment of said two sums of $1,528 93-100 and $5,836 75-100, amounting in the aggregate to the sum of $7,365 68-100.

The plaintiff refused to pay that sum, but tendered to the defendant in payment and satisfaction of the amount claimed to be due upon the two lists the sum of $5,376 90-100 in United States notes issued under authority of the act of the Congress of the United States, approved February 25th, 1862, entitled "An act to authorize the issue of United States notes, and for the redemption or fund-

7 ing thereof, and for funding the floating debt of the United States."

The defendant refused to receive the amount tendered, and for the collection of the full amount demanded by him seized and took into his possession, and advertised and offered for sale, and was about to sell certain goods of the plaintiff, who, thereupon, under protest, paid the full amount, and commenced this action to recover it back.

To this complaint the defendant demurs generally, and the plaintiff joins in demurrer.

This case coming on to be argued at this term, the following occurred as questions, to wit:

8 1st. Whether that portion of the ninth (9th) section of the act of Congress, approved July 13th, 1866, entitled "An act to reduce internal taxation, and to amend an act, entitled 'An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes,'" approved June thirtieth, eighteen hundred and sixty-four, and acts amendatory thereof, which provides as follows, to wit:

"That it shall be the duty of all persons required to make returns or lists of income, and articles or objects charged with an internal tax, to declare in such returns or lists whether the several rates and amounts therein contained are stated according to their values in legal tender currency, or according to their values in coined money; and in case of neglect or refusal so to declare, to the satisfac-

9 tion of the assistant assessor receiving such returns or lists, such assistant assessor is hereby required to make returns or lists for such persons neglecting or refusing, as in cases of persons neglecting or refusing to make the returns or lists required by the acts afore-

said, and to assess the duty thereon, and to add thereto the amount of penalties imposed by law in cases of such neglect or refusal. And whenever the rates and amounts contained in the returns or lists aforesaid, shall be stated in coined money, it shall be the duty of each assessor receiving the same to reduce such rates and amounts to their equivalent in legal tender currency, according to the value of such coined money in said currency, for the time covered by said returns. And the lists required by law to be furnished to collectors by assessors shall in all cases contain the several amounts of taxes or duties assessed, estimated, or valued in legal tender currency only," is to be construed as merely providing a rule as to the currency in which accounts, returns, and lists are to be stated, with a view to uniformity in keeping the accounts of internal revenne, or whether it is to be construed as denying to a person who has received in coined money incomes or other moneys subject to tax or duty, the right to return the amount thereof in the currency in which it was actually received, and to pay the tax or duty thereon in legal tender currency, and be construed to require that the difference between coined money and legal tender currency shall be added to his return when made in coined money, and that he shall pay the tax or duty upon the amount thus increased.

2d. Whether there does not exist between the government of the United States and the holder of notes of the United States, issued under authority of the act of Congress approved February 25th, 1862, entitled "An act to authorize the issue of United States notes and for the redemption or funding thereof, and for funding the floating debt of the United States," a contract that said notes shall be receivable, dollar for dollar, as the equivalent of coined money, in payment of duties and taxes of the character of those collected from the plaintiff in this case.

3d. Whether the portion above referred to of the ninth section of said act of Congress, approved July 13th, 1866, if it be construed as making a distinction between coined money and United States notes issued under authority of the act of February 25th, 1862, above referred to, and as requiring the plaintiff to pay duty for its receipts in coined money upon a larger sum than that actually received, is not an act impairing the obligation of a contract between the United States and the plaintiff, as the holder of such notes?

4th. Whether Congress possesses the power to destroy or repudiate, or impair the obligation of the contract between the United States and the plaintiff, as the holder of such notes?

5th. Whether the United States notes, issued under authority of said act of Congress of February 25th, 1862, and held by the plaintiff, are not private property, within the meaning of the 5th article of the amendments to the Constitution of the United States, (proposed September 25th, 1789, and ratified December 15th, 1791,) and whether the said portion above referred to, of the ninth (9) section of the act of Congress of July 13th, 1866, if construed, as making a distinction between coined money and

legal tender currency, in respect to the payment of such duties as are referred to in this case, and construed as requiring the difference in the market value between coined money and legal tender currency to be added to the amounts stated in the returns made by the plaintiff, and requiring the plaintiff to pay the duty on such increased amount, would not be the taking of private property for public use, without just compensation, and whether said act would not, in its application to the present case, be unconstitutional and void?

6th. Whether the taxes paid by the plaintiff, and sought to be recovered back in this action, are not direct taxes, within the meaning of the Constitution of the United States?

7th. Whether the amount to be raised by such taxes is not
14 required by the Constitution of the United States to be apportioned among the several States, and whether the acts of Congress above referred to, by which said taxes are levied and authorized to be collected without any such apportionment, but according to the rule of uniformity, are not contrary to the Constitution of the United States and void?

On each of these questions, the opinions of the judges were opposed.

Whereupon, on a motion of the plaintiff, by its counsel, that the points on which the disagreement has happened, may during the term, be stated under the direction of the judges, and certified under the seal of the court, to the Supreme Court, to be finally decided.

It is ordered, that the foregoing state of the pleadings and statement of facts, and questions made under direction of judges be certified according to the request of the plaintiff by its coun-
15 sel, and the law in that case made and provided.

October 18, 1866.

THE UNITED STATES OF AMERICA,
District of California:

I, Geo. C. Gorham, clerk of the circuit court for the district of California, do hereby certify the foregoing to be a copy from the minutes.

Given under my hand and seal of office, on this twenty-seventh day of October, A. D. 1866.

[SEAL.] GEO. C. GORHAM, *Clk.*
By S. NEALL, *D. C.*

PACIFIC INSURANCE COMPANY, PLAINTIFF,

vs.

FRANK SOULE, COLLECTOR OF INTERNAL REVENUE.

Writ of certiorari and return.

Filed, 27 August, 1867.

15 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States, for the district of California, greeting:

Whereas, in a certain suit in said circuit court, between the Pacific Insurance Company, plaintiff, and Frank Soule, defendant, which suit was removed to the Supreme Court of the United States, by virtue of a certificate of division in opinion between the judges of the said circuit court, agreeably to the act of Congress in such case made and provided; a diminution of the record and proceedings of said cause has been suggested, to wit:

"That portion of the record which shows that the cause originated in one of the State courts of California, and was afterwards transferred to the circuit court of the United States for decision prior to the certificate of division of opinion upon which it came up in this court."

You, therefore, are hereby commanded, that, searching the records and proceedings in said cause, you certify what omissions and errors you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness, the Honorable Salmon P. Chase, Chief Justice of said Supreme Court, the first Monday of December, A. D. 1866.

[SEAL.] D. W. MIDDLETON,
Clerk Sup. Court U. States.

Issued 29th day of April, A. D. 1867.

Endorsed: Supreme Court U. S., 1866, Dec. term, No. 335. Pacific Insurance Co., plaintiff, *vs.* Soule, Collector. Writ of certiorari. Filed July 5th, 1868. Geo. C. Gorham, clerk, and John O. Wheeler, dep'ty.

16 United States circuit court for the district of California.

THE PACIFIC INSURANCE COMPANY, plaintiff,
vs.
FRANK SOULE, defendant.

In obedience to the writ of certiorari directed to us, the judges of thr circuit court of the United States for the district of California, in the case of the Pacific Insurance Company, plaintiff, *against* Frank Soule, defendant, which suit was removed to the Supreme Court of the United States, upon a certificate of division in opinion between the judges of said court, commanding us to certify what omissions and errors we shall find in the record in said cause to the Supreme Court of the United States. We hereby certify that the following records, files, and papers were omitted from the transcript sent to the said Supreme Court of the United States in said case, to wit:

1st. The complaint in said cause in 15th dist. ct. State Cal'a.

2d. The summons issued therein and sheriff's return.

3d. The petition of Frank Soule for removal of cause to U. S. Court, with certificate of Delas Lake, writ of certiorari, and marshal's return thereon.

4th. Demurrer to complaint.

5th. Amended complaint, with acknowledgment of service thereon.

6th. Demurrer to amended complaint.

17 7th. Order of submission of demurrer.

And we hereby order the clerk of this court forthwith to send to said Supreme Court of the United States, a true and correct copy of all of the above records, files, and papers, together with and including the certificate of division of said judges; and that he return therewith the writ of certiorari heretofore issued to us, together with this order.

Dated at San Francisco, California, this twenty-seventh day of July, A. D. 1867.

STEPHEN J. FIELD,
Associate Justice of U. S. Sup. Ct., and Circuit Judge of the Ninth Circuit.
OGDEN HOFFMAN,
Dist. Judge.

18 Complaint in said case, to wit:

In the district court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco.

Complaint.

THE PACIFIC INSURANCE COMPANY, plaintiff,
vs.
FRANK SOULE, defendant.

The above-named plaintiff complains of the above-named defendant, and for cause of action alleges—

That the plaintiff is, and has been, since the fourteenth day of July, A. D. 1863, a corporation, duly formed and existing under the laws of

the State of California, having its office and principal place of business in said city and county of San Francisco, and being engaged as such corporation in the business of making insurance upon vessels, freight, money goods, and effects, and against fire, and in the transaction of all other business in which, as an insurance
19 company, incorporated under said laws, it might lawfully engage.

That the defendant is a citizen of the State of California, and a resident of said city and county of San Francisco; that during the quarter year, from the 1st day of April, A. D. 1866, to the 30th day of June, 1866, both days inclusive, the plaintiff, in the course of its business as such insurance company, made certain net gains, which amounted to the sum of eighty-five thousand two hundred and eighteen ($85,218,) dollars, and no more, whereof the sum of forty-five thousand dollars ($45,000,) was, by the proper order and resolution of the plaintiff's directors, declared due and payable to the plaintiff's stockholders as dividends, and the remaining sum of forty thousand two hundred and eighteen dollars ($40,218,) was, on said 30th day of June, A. D. 1866, still undistributed and on hand.

That during the month of July, A. D. 1866, the plaintiff, in the course of its business as such insurance company, made insurances to the amount of five million seven hundred and thirty-seven thousand eight hundred and ninety-four dollars, ($5,757,894,) and
20 on account thereof received for premiums the sum of seventy-four thousand four hundred and nine ($74,409) dollars.

That on the 31st day of August, A. D. 1866, J. M. Asher, the assistant assessor of division 5 of the 1st collection district of the State of California, under the division of said State into collection districts, made under the act of Congress of the United States, entitled "An act to provide internal revenue to support the government and to pay interest on the public debt," approved July 1st, 1862, and other acts upon the same subject, in which division and district is situated the office of the plaintiff, representing that he had authority under said acts of Congress so to do, requested and demanded of the plaintiff and its proper officers, a list or return of all dividends declared due, or paid to stockholders, policy-holders, or to depositors by the managers of the plaintiff, in said city and county, and said 1st collection of said State, during said quarter year, and of all undivided profits of the plaintiff from the 1st day of April, 1866, to the 30th day of June, 1866, both days inclusive, and also a
21 separate account and return of premiums and assessments for insurance loss or damage by fire or by the perils of the sea, received by the plaintiff, together with the amount insured by the plaintiff during the month of July, A. D. 1866, and requested that said two several accounts and returns should be made out and delivered to him, in a certain form, and verified in a certain manner, as shown in certain printed forms exhibited by him.

That thereupon, on said 31st day of August, A. D. 1866, the plaintiff, by its proper officers, made out and delivered to said J. M. Asher, the two several and separate accounts and returns requested by him,

being severally in the forms aforesaid, each of them being duly verified by A. J. Ralston, who is the secretary of the plaintiff, and the proper officer, under the law and the bye-laws of the plaintiff, to make out and verify such statements of plaintiff's business and affairs.

That the paper hereto annexed, marked "exhibit No. 1," and made part of this complaint is a true and correct copy of said
22 first mentioned list or return of dividends and undivided profits for said quarter year, as the same was made out and verified by said Ralston, and delivered to said Asher, and the original thereof was a true and correct list or return; that upon the delivery thereof to said Asher, he enquired of said Ralston whether the amounts stated in said return were stated in gold coin or in legal tender currency, and upon being informed that they were stated in gold coin, the said Asher added to and changed said list or return by writing thereon the word "gold," and also the words and figures "currency value 7 c.," and the figures "116,737—5" and "5,836 75," as shown upon the paper marked "exhibit No. 2," which is hereto annexed and made part of this complaint, and which is a true copy of said list or return, as the same appeared after the making of said alterations and additions.

That the paper hereto annexed, marked "exhibit No. 3," and made part of this complaint, is a true and correct copy of said account and return of amounts insured and premiums received during the month of July, 1866, as the same was made out and verified by said
23 Ralston, and delivered to said Asher, and was a correct and true account and return; that upon the delivery thereof to said Asher, he enquired of said Ralston whether the amounts stated in said return was stated in gold coin or in legal tender currency, and upon being informed that they were stated in gold coin, the said Asher added to and changed said account and return by writing thereon the word "gold," and the words and figures "currency value 73c.," and the figures "1,019 29. 1½ p. c.—1,528 93," as shown upon the paper marked "exhibit No. 4," which is hereto annexed and made part of this complaint, and which is a true copy of said account and return, as the same appeared after the making of said alterations and additions.

That said alterations and additions were intended to have and did have the effect materially to change the said accounts and returns, and to show that the total amount of dividends declared and undivided profits was the sum of one hundred and sixteen thousand seven hundred and thirty-seven dollars, ($116,737,) instead of the sum of eighty-five thousand two hundred and eighteen dollars, ($85,218,) which was the true sum, and that five per per cent. (5 p. c.
24 thereof) was the sum of five thousand eight hundred and thirty-six 75-100 dollars, ($5,836 75-100,) instead of the true sum four thousand two hundred and sixty 90-100 dollars, ($4,260 90-100,) and to show that the total amount of premiums received during the month of July, 1866, was one hundred and one thousand nine hundred and twenty-nine dollars ($101,929,) instead of the true amount, seventy-four thousand four hundred and nine dollars, ($74,409,)

and that one and one-half per cent thereof (1½ p. c.,) was the sum of one thousand five hundred and twenty-eight 93-100 dollars, ($1,528 93-100,) instead of the true sum, one thousand one hundred and sixteen dollars, ($1,116 00.)

That said alterations and additions were made without the consent or authority of the plaintiff, or any one authorized in its behalf to give such consent or authority, and against the will and objection of the plaintiff, and contrary to the protest of the plaintiff, made by said Ralston, a note of which protest was made upon each of said accounts and returns.

That said two several and separate accounts and returns, as
25 the same had been added to and altered by said Asher, were then delivered by said Asher to the said Frank Soule, the defendant, who then was, and still is the collector of internal revenue for the 1st district of said State of California.

That said defendant, pretending to have authority so to do as such collector, thereupon, on the third day of September, A. D. 1866, presented said two several accounts and returns so altered and added to, one of which, "exhibit No. 2," and "exhibit No. 4," are copies, to the plaintiff, and demanded payment from the plaintiff of the two several sums therein specified, to wit: the sum of five thousand eight hundred and thirty-six 75-100 dollars, ($5,836 75-100,) and one thousand five hundred and twenty-eight 93-100 dollars, ($1,528 93-100,) amounting in the aggregate to the sum of seven thousand three hundred and sixty-five 68-100 dollars, ($7,365 68-100,) alleging that the same was due and collectable from the plaintiff, upon the said accounts and returns, by force of the provisions of the act of Congress,
26 entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," approved June 30, 1864, and other acts in addition thereto, or in amendment thereof, and that he, the defendant, had authority in law to demand and receive said sums, and to enforce the payment thereof by the plaintiff, by distraint and sale of plaintiff's goods, and to collect and make the said sum out of the plaintiff's goods by sale thereof.

That the plaintiff did, thereupon, on said third day of September, 1866, under protest, pay said sum of money, to wit, the sum of seven thousand three hundred and sixty-five 68-100 dollars ($7,365 68-100) to the defendant upon compulsion and under duress of goods; that the defendant, under color of his said office of collector, and of his said pretended authority as such collector, to demand, and receive, and collect from the defendant, by distraint and sale, the said sum of seven thousand three hundred and sixty-five 68-100 dollars, ($7,365 68-100 alleged to be due from defendant, as duties or taxes upon said two accounts, and returns had seized and taken into his possession, and advertised and offered for sale, and was about to sell defendant's goods to make said sum of money, and that such sale would immediately have been made, had not the plaintiff then paid said sum of money; and that the plaintiff was forced to make, and did make such payment to prevent and avoid such sale, and to

avoid the great loss and damage which the plaintiff would thereby have sustained.

That when the defendant received said two returns from the said Asher, he was informed and had notice that the same had been altered and added to by said Asher, as hereinbefore alleged, without any authority in law, and without the consent and against the objection and protest of the plaintiff, and were not the accounts and returns made out and delivered by the plaintiff to said assessor.

And the plaintiff further alleges, that the defendant had no right or authority in law to demand or receive from the plaintiff any part of said sum of money, and the same was received by the defendant to the plaintiff's use.

And for a further and separate cause of action, the plaintiff alleges,
that on the third day of September, A. D. 1866, at the city
27 and county of San Francisco, in the State of California, the said defendant received from the plaintiff the sum of seven thousand three hundred and sixty-five 68-100 dollars to the use of the plaintiff.

Wherefore, the plaintiff prays judgment against the defendant for the sum of seven thousand three hundred and sixty-five 68-100 dollars, ($7,365 68-100,) with interest, from the third day of September 1866, and costs.

WILSON CRITTENDEN,
HARMAN & WHITNEY,
Atty's for Plaintiff.

(65.)

28 *Exhibit No.* 1.

Return of banks, trust companies, savings institutions, insurance, railroad, canal, and turnpike companies, of dividends declared and paid or payable.

[Sections 120–122.]

Account of all dividends, in scrip or money, declared due or paid to stockholders, to policy holders, or to depositors, by the managers of the Pacific Insurance Company, in the city of San Francisco, in the county of San Francisco, and first collection district of the State of California, with the amount of tax thereon deducted and withheld from the persons to whom said dividends were paid, and of all undivided profits of the said Pacific Insurance Company, from the first day of April, 1866, to the thirtieth day of June, 1866, both days inclusive, pursuant to an act entitled "An act to provide internal

revenue to support the government, to pay interest on the public debt, and for other purposes," approved June 30, 1864, viz:

Capital.	Net gains since prior dividend.	Amount of dividend declared.	95 per cent. of dividend, being the whole amount paid to stockholders, &c.	5 per cent. of dividend retained as excise tax.
$750,000	$85,218	$45,000	5 p. c. of which is	$2,250 00
Profits over dividend declared....$			5 per cent. of which is	2,010 90
Total excise tax.....				4,260 90
			Per cent. of which is....	$
Total excise tax.....				$

(Signed) A. J. RALSTON.

I, A. J. Ralston, do swear that the above account contains, to the best of my knowledge and belief, a true and faithful statement of all dividends declared due or paid by the Pacific Insurance Co., and of the undivided profits thereof, together with the amount of taxes which have accrued thereon, or should accrue, and not accounted for, during the time, and according to the provisions of the act aforementioned.

(Signed) A. J. RALSTON.

Sworn and subscribed before me, this 31 day of August, 1866.

J. M. ASHER,
Assistant Assessor.

29 *Exhibit No. 2.*

(65.)

Return by banks, trust companies, savings institutions, insurance, railroad, canal, and turnpike companies, of dividends declared and paid or payable.

[Sections 120–122.]

Account of all dividends, in scrip or money, declared due or paid to stockholders, to policy holders, or to depositors, by the managers of the Pacific Insurance Company, in the city of San Francisco, in the county of San Francisco, and first collection district of the State of California, with the amount of tax thereon deducted and withheld from the persons to whom said dividends were paid, and of all undivided profits of the said Pacific Insurance Company, from the first day of April, 1866, to the thirtieth day of June, 1866, both days inclusive, pursuant to an act entitled "An act to provide internal rev-

enue to support the government, to pay interest on the public debt, and for other purposes," approved June 30, 1864, viz:

Capital.	Net gains since prior dividend.	Amount of dividend declared.	95 per cent. of dividend, being the whole amount paid to stockholders, &c.	5 per cent. of dividend retained as excise tax.
$750,000	$85,218, gold.	$45,000	5 p. c. of which is.....	$2,250 00
Profits over dividend declared....$			5 per cent of which is.....	2,010 90
Total excise tax.....				4,260 90
Currency value 73 *a*			5 per cent of which is.....	5,836 85—gold.
Total excise tax.....				$

(Signed) A. J. RALSTON.

I, A. J. Ralston, do swear that the above account contains, to the best of my knowledge and belief, a true and faithful statement of all dividends declared due or paid by the said Pacific Insurance Co., and of the undivided profits thereof, together with the amount of taxes which have accrued thereon, or should accrue, and not accounted for, during the time and according to the provisions of the act aforementioned.

(Signed) A. J. RALSTON.

Sworn and subscribed before me, this 31st day of August, 1866.

J. M. ASHER,
Assistant Assessor, Div. 5.

The conversion of gold into currency is under protest.

A. J. RALSTON.

(64)

30 *Exhibit No. 3.*

Monthly return of all insurance companies, (except life,) whether inland or marine, of premiums and assessments.

Account of premiums and assessments received by the Pacific Insurance Company of the city of San Francisco, in the county of San Francisco, and State of California, together with the amount insured during the month of July, 1866, pursuant to the provisions of an act entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," approved June 30, 1864, viz:

	Amount insured.	Received.	Rate of tax.	Amount of tax.
Premiums	5,737,894	74,409 00	1½ per cent.	1,116 00
Assessments.—Total			1½ per cent.	

(Signed) A. J. RALSTON.

I, A. J. Ralston, do swear that the above account contains, according to the best of my knowledge and belief, a true and faithful statement of the amount of insurance made, renewed, or continued, or endorsed upon any open policy by said company or their agents, with the amount of premium received therefor, and the amounts of receipts for assessments during the month of July, 1866, according to the provisions of the act aforesaid.

(Signed) A. J. RALSTON.

Sworn and subscribed before me, this 31 day of August, 1866.

J. M. ASHER,
Assistant Assessor 1 Collection Dist. Cala., Div. 5.

31 *Exhibit No. 4.*

Monthly return of all insurance companies, (except life,) whether inland or marine, of premiums and assessments.

Account of premiums and assessments received by the Pacific Insurance Company of the city of San Francisco, in the county of San Francisco, and State of California, together with the amount insured during the month of July, 1866, pursuant to the provisions an act entitled "An act to provide internal revenue, to support

the government, to pay interest on the public debt, and for other purposes," approved June 30th, 1864, viz:

	Amount insured.	Received.	Rate of tax.	Amount of tax.
Premiums	5,737,894	74,409 00	1½ per cent.	1,116 00—gold.
Assessments		1,019 29	1½ per cent.	1,528 93

(Signed) A. J. RALSTON.

I, A. J. Ralston, do swear that the above account contains, according to the best of my knowledge and belief, a true and faithful statement of the amount of insurance made, received, or continued, or endorsed upon any open policy by said company or their agents, with the amount of premium received therefor, and the amount of receipts for assessments during the month of July, 1866, according to the provisions of the act aforesaid.

(Signed) A. J. RALSTON.

Sworn and subscribed before me, this 31 day of August, 1866.

J. M. ASHER,
Assistant Assessor 1 Collection District Cala., Div. 5.

The conversion of gold into currency is made under protest.

A. J. RALSTON.

Endorsed: Filed Oct. 1, 1866. Geo. C. Gorham, cl'k.

32 *Summons.*

In the district court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco.

THE PACIFIC INSURANCE COMPANY, plaintiff,
vs.
FRANK SOULE, defendant.

Action brought in the district court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco, and the complaint filed in said city and county of San Francisco, in the office of the clerk of said district court.

The people of the State of California send greeting to Frank Soule:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco, and to answer the complaint filed
33 therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; or, if served out of this county, but in this district,

within twenty days; otherwise within forty days, or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to recover the sum of $7,365 08, with interest thereon, from Sept. 3d, 1866, being due from you to plaintiff, for so much money paid to you by plaintiff under protest, as particularly stated in the complaint, and for so much money received by you from plaintiff to the use of plaintiff, besides costs of suit.

And you are hereby notified, that if you fail to appear and answer the said complaint, as above required, the said plaintiff will apply to the court for the relief therein demanded.

Given under my hand and seal of the district court of the fifteenth judicial district of the State of California, in and for the city
34 and county of San Francisco, this 21st day of September, in the year of our Lord one thousand eight hundred and sixty-six.

WM. LAEWRY, *Clerk.*
By G. C. LETCHER,
Deputy Clerk.

[50-ct. U. S. rev. stamp, cancelled.]

OFFICE OF THE SHERIFF OF THE
CITY AND COUNTY OF SAN FRANCISCO.

I hereby certify that I received the within summons on the 22d day of September, A. D. 1866, and personally served the same on the same day of September, A. D. 1866, upon the within named defendant, Frank Soule, by delivering to and leaving with the said defendant, personally, in the city and county of San Francisco, a copy of said summons, attached to a certified copy of the complaint in said action therein named.

Dated at San Francisco, this 22d day of September, 1866.

HENRY L. DAVIS, *Sheriff.*
By F. E. R. WHITNEY,
Deputy Sheriff.

Endorsed: Filed Sept. 22, 1866. Wm. Laewry, clerk. By Wm. R. Satterlee, deputy clerk.

35 *Petition of Frank Soule, etc.*

To the honorable the circuit court of the United States, tenth circuit, within and for the northern district of California:

The petition of Frank Soule respectfully represents to this honorable court, that he is the collector of the internal revenue within and for the first collection district of California, and that an action has been commenced against him in the fifteenth judicial district court of the State of California, in and for the city and county of San Francisco, by the Pacific Insurance Company, to recover the sum of seven thousand three hundred and sixty-five dollars and sixty-eight cents, with interest thereon, from the third day of September, 1866.

Your petitioner further respectfully represents, that said suit is brought against petitioner to recover money collected by him as collector of internal revenue, under the laws of the United States,
36 which money, as is alleged in the complaint filed against him by the said Pacific Insurance Company, was paid under protest; and it is further alleged in said complaint, that your petitioner had no right or authority under the laws of the United States to collect the same.

Wherefore your petitioner prays that said suit may be removed to from the said State court, *to* this honorable court, in accordance with the provisions of the act of Congress, in such case made and provided.

FRANK SOULE.

STATE OF CALIFORNIA,
City and county of San Francisco:

Frank Soule, being duly sworn, says that he is the defendant in the suit of the Pacific Insurance Company, against Frank Soule, now pending in the fifteenth judicial district court of the State of California; that be has read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge.

FRANK SOULE.

Sworn to before me, this 24 Sept. 1866.

DAN'L T. SULLIVAN,
U. S. Com'r.

37 *Certificate of Delas Lake.*

I, Delas Lake, do hereby certify that, as counsel for petitioner, I have examined the foregoing petition of Frank Soule; that I have examined the proceedings in the case of the Pacific Insurance Company against Frank Soule, and have carefully inquired into all the matters set forth in said petition, and I believe the same to be true.

I do further certify, that I am an attorney and counsellor at law, duly admitted and licensed to practice in all the courts of the State of California.

DELAS LAKE.

38 *Certiorari.*

THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of California, ninth circuit.

To the fifteenth district court of the State of California, within and for the city and county of San Francisco, and the presiding judge thereof, greeting:

Whereas, we have understood from the petition of Frank Soule, duly sworn and certified, that according to the provisions of the act

of Congress of the United States, in such case made and provided, that an action is now pending before you in a case wherein the Pacific Insurance Co. is plaintiff, and Frank Soule is defendant; and it further appearing to our satisfaction from the petition aforesaid, that said action is brought to recover the sum of seven thousand three hundered and sixty-five dollars and sixty-eight cents, with interest thereon from the 3d day of September, 1866, money collected by him, said Soule, as collector of internal revenue
39 under the laws of the United States, which money, as alleged by the said Pacific Insurance Co., was paid under protest, and further alleged that said Soule had no right or authority under the laws of the United States to collect the same.

You are therefore required to send to our circuit court of the United States the record and proceedings in said cause, and have the same at the city of San Francisco, in the district aforesaid, on the first Monday of October, A. D. 1866.

[SEAL.]

GEO. C. GORHAM, *Clk.*
By S. NEAL, *D. C.*

U. S. Marshal's return.

OFFICE OF THE MARSHAL
Of the District of California:

I hereby certify that I received the within writ on the 24th day of September, A. D. 1866, and personally served the same on the 24th day of September, A. D. 1866, by delivering to the clerk of the fifteenth district court for the State of California, personally, in the city and county of San Francisco, a copy of said writ.

Dated San Fancisco, this 24th day of September, A. D. 1866.

CHA'S W. RAND,
U. S. Marshal.
By A. C. TAYLOR,
Deputy.

Filed, Sept. 26, 1866. Geo. C. G. Gorham, Clerk.

Demurrer to Complaint.

40 Circuit court of the United States, tenth district.

THE PACIFIC INSURANCE COMPANY, plaintiff,
against
FRANK SOULE, defendant.

And the said defendant, by Delas Lake, his attorney, comes and defends the wrong, &c., and injury, when, &c., and says that the said complaint, and the matters therein contained, in the manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain the aforesaid action thereof against the said defendant, and he, the said defendant,

Your petitioner further respectfully represents, that said suit is brought against petitioner to recover money collected by him as collector of internal revenue, under the laws of the United States,
36 which money, as is alleged in the complaint filed against him by the said Pacific Insurance Company, was paid under protest; and it is further alleged in said complaint, that your petitioner had no right or authority under the laws of the United States to collect the same.

Wherefore your petitioner prays that said suit may be removed to from the said State court, *to* this honorable court, in accordance with the provisions of the act of Congress, in such case made and provided.

FRANK SOULE.

STATE OF CALIFORNIA,
City and county of San Francisco:

Frank Soule, being duly sworn, says that he is the defendant in the suit of the Pacific Insurance Company, against Frank Soule, now pending in the fifteenth judicial district court of the State of California; that be has read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge.

FRANK SOULE.

Sworn to before me, this 24 Sept. 1866.

DAN'L T. SULLIVAN,
U. S. Com'r.

37 *Certificate of Delas Lake.*

I, Delas Lake, do hereby certify that, as counsel for petitioner, I have examined the foregoing petition of Frank Soule; that I have examined the proceedings in the case of the Pacific Insurance Company against Frank Soule, and have carefully inquired into all the matters set forth in said petition, and I believe the same to be true.

I do further certify, that I am an attorney and counsellor at law, duly admitted and licensed to practice in all the courts of the State of California.

DELAS LAKE.

38 *Certiorari.*

THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of California, ninth circuit.

To the fifteenth district court of the State of California, within and for the city and county of San Francisco, and the presiding judge thereof, greeting:

Whereas, we have understood from the petition of Frank Soule, duly sworn and certified, that according to the provisions of the act

of Congress of the United States, in such case made and provided, that an action is now pending before you in a case wherein the Pacific Insurance Co. is plaintiff, and Frank Soule is defendant; and it further appearing to our satisfaction from the petition aforesaid, that said action is brought to recover the sum of seven thousand three hundered and sixty-five dollars and sixty-eight cents, with interest thereon from the 3d day of September, 1866, money collected by him, said Soule, as collector of internal revenue
39 under the laws of the United States, which money, as alleged by the said Pacific Insurance Co., was paid under protest, and further alleged that said Soule had no right or authority under the laws of the United States to collect the same.

You are therefore required to send to our circuit court of the United States the record and proceedings in said cause, and have the same at the city of San Francisco, in the district aforesaid, on the first Monday of October, A. D. 1866.

[SEAL.] GEO. C. GORHAM, *Clk.*
By S. NEAL, *D. C.*

U. S. Marshal's return.

OFFICE OF THE MARSHAL
Of the District of California:

I hereby certify that I received the within writ on the 24th day of September, A. D. 1866, and personally served the same on the 24th day of September, A. D. 1866, by delivering to the clerk of the fifteenth district court for the State of California, personally, in the city and county of San Francisco, a copy of said writ.

Dated San Fancisco, this 24th day of September, A. D. 1866.

CHA'S W. RAND,
U. S. Marshal.
By A. C. TAYLOR,
Deputy.

Filed, Sept. 26, 1866. Geo. C. G. Gorham, Clerk.

Demurrer to Complaint.

40 Circuit court of the United States, tenth district.

THE PACIFIC INSURANCE COMPANY, plaintiff,
against
FRANK SOULE, defendant.

And the said defendant, by Delas Lake, his attorney, comes and defends the wrong, &c., and injury, when, &c., and says that the said complaint, and the matters therein contained, in the manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain the aforesaid action thereof against the said defendant, and he, the said defendant,

is not bound by law to answer the same; and this, the said defendant, is ready to verify. Wherefore, by reason of the insufficiency of
41 the said complaint in this behalf, the said defendant prays judgment, and that the said plaintiff be barred from having or maintaining the aforesaid action against him.

Dated at San Franscisco, October 3, 1866.

DELAS LUKE,
Defendants' Attorney.

We hereby admit service on us of a copy of the within demurrer, at our office in San Francisco, this 3d day of October, 1866.

WILSON & CRITTENDEN.

Endorsed: Filed, Oct. 3, 1866. Geo. C. Gorham, clerk.

42 *Amended complaint.*

In the circuit court of the United States, ninth circuit.—State of California.

THE PACIFIC INSURANCE COMPANY, plaintiff,
vs
FRANK SOULE, defendant.

Action commenced in the district court of the 15th judicial district of the State of California, in and for the city and county of San Francisco, and removed to said circuit court, on the application of the defendant.

The above-named plaintiff complains of the above-named defendant, and for cause of action alleges, that the plaintiff is and has been, since the 14th day of July, A. D., 1863, a corporation duly
43 formed and existing under the laws of the State of California, having its office, and principal place of business in said city and county of San Francisco, and being engaged as such corporation in the business of making insurance upon vessels, freight, money, goods, and effects, and against fire, and in the transaction of all other business in which as an Insurance Company, incorporated under said laws, it might lawfully engage.

That the defendant is a citizen of the State of California, and a resident of said city and county of San Francisco.

That during the quarter year from the 1st day of April, 1866, to the 30th day of June, 1866, both days inclusive, the plaintiff in the course of its business as such Insurance Company, made certain net gains, which amounted to the sum of ($85,218) eighty-five thousand two hundred and eighteen dollars, and no more, whereof the sum of forty-five thousand dollars ($45,000,) *dollars*, was by the proper order and resolution of the plaintiff's directors, declared due and payable to the plaintiff's stockholders, as dividends, and the remaining sum of forty thousand two hundred and eighteen ($40,218) dollars, was on said 30 day of June, A. D. 1866, still undistributed and on hand.

That during the month of July, A. D. 1866, the plaintiff, in the course of its business as such insurance company, made insurance to the amount of five millions seven hundred and thirty-seven thousand eight hundred and ninety-four ($5,738,894) dollars, and on account thereof received for premiums the sum of seventy-four thousand four hundred and nine ($74,409) dollars.

That on the 31st day of August, A. D. 1866, J. M. Asher,
45 the assistant assessor of division 5, of the 1st collection district of the State of California, under the division of said State into collection districts, made under the acts of the Congress of United States, entitled "An act to provide internal revenue to support the government and to pay interest on the public debt," approved July 1st, 1862, and other acts upon the same subject, in which division and district is situated the office of the plaintiff, representing that he had authority under said acts of Congress, so to do, requested and demanded of the plaintiff and its proper officers a list or return of all dividends declared due or paid to stockholders, to policy holders, or to depositors, by the managers of the plaintiff, in said city and county and said 1st collection district of said State during said quarter year, and of all undivided profits of the plaintiff from the 1st day of April, 1866, to the 30th day
46 of June, 1866, both days inclusive, and also a separate account and return of premiums and assessments for insurance for loss or damage by fire, or by the perils of the sea, received by the plaintiff, together with the amount insured by the plaintiff during the month of July, A. D. 1866, and required that said two several accounts and returns should be made out and delivered to him in a certain form, and verified in a certain manner, as shown in certain printed forms exhibited by him.

That thereupon, on said 31st day of August, A. D. 1866, the plaintiff by its proper officers, made out and delivered to said J. M. Asher, the two several and separate and accounts and returns requested by him, being severally in the forms aforesaid, each of them being duly verified by A. J. Ralston, who is the secretary of the plaintiff, and the proper officer under the law and the bye-laws of the plain-
47 tiff to make and *and* verify such statements of plaintiff's business and affairs.

That the paper hereto annexed, marked "exhibit No. 1," and made part of this complaint, is a true and correct copy of said first mentioned list or return of dividends and undivided profits for said quarter year, as the same was made out and verified by said Ralston and delivered to said Asher, and the original thereof was a true and correct list or return; that upon the delivery thereof to said Asher, he required of said Ralston whether the amounts stated in said return were stated in gold coin or legal tender currency, and upon being informed that they were stated in gold coin, the said Asher added to and changed said list or return by writing thereon the words "gold," and also the words and figures "currency value, 73c.," and the figures "116,737—5," and "5,836 75," as shown upon
48 the paper marked "exhibit No. 2," which is hereto annexed

and made part of this complaint, and which is a true copy of said list or return, as the same appeared after the making of said alterations and additions.

That the paper hereto annexed marked "exhibit No. 3," and made part of this complaint, is a true and correct copy of said accounts and return of amounts insured and premiums received during the month of July, 1866, as the same was made out and verified by said Ralston, and delivered to said Asher, and was a corrrect and true account and return; that upon the delivery thereof to said Asher, he enquired of said Ralston whether the amounts stated in said return were stated in gold coin or legal tender currency, and upon being informed that they were stated in gold coin, the said Asher added to, and changed said account and return by writing thereon the word "gold," and the words and figures "currency value, 73c.," and the figures "101,929—1½ per cent. 1,528,
49 93," as shown upon the paper marked "exhibit No. 4," which is hereto annexed and made part of this complaint, and which is a true copy of said account and return as the same appeared after the making of said alterations and additions.

That said alterations and additions were intended to have, and did have the effect, materially to change the said accounts and returns, and to show that the total amount of dividends declared, and undivided profits was the sum of ($116,737) one hundred and sixteen thousand seven hundred and thirty-seven dollars, instead of the sum of eighty-five thousand two hundred and eighteen ($85,218) dollars, which was the true sum; and that 5 per cent. was the sum of five thousand eight hundred and thirty-six 75-100 dollars, ($5,836 75,) instead of the true sum, four thousand two hundred and sixty 90-100 dollars, ($4,260 90,) and to show that the total amount of premiums received during the month of July, 1866, was one hundred
50 and one thousand nine hundred and twenty-nine ($101,929) dollars, instead of the true amount, seventy-four thousand four hundred and nine, ($74,409,) and that 1½ per cent. thereof was the sum of one thousand five hundred and twenty-eight and 93-100 dollars, instead of the true sum, one thousand one hundred and sixteen ($1,116) dollars.

That said alterations and additions were made without the consent or authority of the plaintiff, or any one authorized in its behalf to give such consent or authority, and against the will and objection of the plaintiff, and contrary to the protest of the plaintiff made by said Ralston, a note of which protest was made upon each of said accounts and returns.

That said two several and separate accounts and returns, as the same had been added to and altered by said Asher, were then delivered by said Asher to the said Frank Soule, the defendant, who then was, and still is, the collector of internal revenue for the 1st
51 district of said State of California.

That said defendant, pretending to have authority so to do, as such collector, thereupon, on the 3d day of September, A. D. 1866, presented said two several accounts and returns so altered and

added to, and of which "exhibit No. 2" and "exhibit No. 4" are copies, to the plaintiff, and demand payment from the plaintiff of the two several sums therein specified, to wit: the sum of five thousand eight hundred and thirty-six 75-100 dollars ($5,836 75,) and one thousand five hundred and twenty-eight 93-100 dollars, ($1,528 93,) amounting in the aggregate to the sum of seven thousand three hundred and sixty-five 68-100 dollars, ($7,365 68,) alleging that the same was due and collectable from the plaintiff upon the said accounts and returns by force of the provisions of the act of Congress, entitled "An act to provide internal revenue to support the government, to
52 pay interest on the public debt, and for other purposes," approved June 30th, 1866, and other acts in addition thereto, or in amendment thereof, and that he, the defendant, had authority in law to demand and receive said sums, and to enforce the payment thereof by the plaintiff, by distraint and sale of the plaintiff's goods, and to collect and make the said sum out of the plaintiff's goods by the sale thereof.

That thereupon the plaintiff offered and tendered to said defendant, in satisfaction and payment of the amounts due upon said several accounts and returns, the sum of five thousand three hundred and seventy-six 90-100 dollars, ($5,376 90,) being the total amount appearing due from said plaintiff by said two accounts and returns before the same were altered as aforesaid, which tender was made in United States notes issued under authority of the act of Congress of the United States, approved February 25th, 1862, entitled
53 "An act to authorize the issue of United States notes, and for the redemption or funding thereof, and for funding the floating debt of the United States;" but the defendant refused to accept the same in payment, but demanded payment of the whole sum of seven thousand three hundred and sixty-five 68-100 dollars, ($7,365 68,) and to collect the same, seized the plaintiff's goods, as hereinafter stated.

That the plaintiff did thereupon, on the said 3d day of September, 1866, under protest, pay said sum of money, to wit: the sum of seven thousand three hundred and sixty-five 68-100 dollars ($7,365 68) to the defendant, upon compulsion, and under duress of goods; that the defendant, under color of his said office of collector, and of his said pretended authority as such collector, to demand and receive and collect from the plaintiff, by distraint and sale, the said sum of
54 seven thousand three hundred and sixty-five 68-100 dollars, ($7,365 68,) alleged to be due from plaintiff, as duties or taxes upon said two accounts and returns, seized and took into his possession, and advertised and offered for sale, and was about to sell plaintiff's goods to make said sum of money, and that such sale would immediately have been made had not the plaintiff then paid said sum of money, and that the plaintiff was forced to make, and did make such payment to prevent and avoid such sale, and avoid the great loss and damage which the plaintiff would thereby have sustained.

That when the defendant received said two returns from the said Asher, he was informed and had notice that the same had been

altered and added to by said Asher, as hereinbefore alleged, without any authority in law, and without the consent and against the
55 objection and protest of the plaintiff, and were not the accounts and returns made out and delivered by the plaintiff to said assessor.

And the plaintiff further alleges that the defendant had no right or authority in law to demand or receive from the plaintiff, any part of said sum of money, and the same was received by the defendant to the plaintiffs use.

And for a further and separate cause of action, the plaintiff alleges that on the 3d day of September, A. D. 1866, at the city and county of San Francisco, in the State of California, the said defendant received from the plaintiff the sum of seven thousand three hundred and sixty-five 68-100 dollars ($7,365 68,) to the use of the plaintiff.

Wherefore, the plaintiff prays judgment against the defendant, for the sum of seven thousand three hundred and sixty-five
56 68-100 dollars ($7,365 68,) with interest from the 3d day of September, 1866, and costs.

WILSON & CRITTENDEN.
HARMON & WHITNEY,
Atty's for Plaintiff.

57 *Exhibit No. one.*

(65.)

Return by banks, trust companies, savings institutions, insurance, railroad, canal, and turnpike companies, of dividends declared and paid or payable.

[Sections 120—122.]

Account of all dividends, in scrip or money, declared due, or paid to stockholders, to policy holders, or to depositors, by the managers of the Pacific Insurance Company, in the city of San Francisco, in the county of San Francisco, and first collection district of the State of California, with the amount of tax thereon deducted and withheld from the persons to whom said dividends were paid, and of all undivided profits of the said Pacific Insurance Company, from the first day of April, 1866, to the thirtieth day of June, 1866, both days inclusive, pursuant to an act entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," approved June 30, 1864, viz:

Capital.	Net gains since prior dividend.	Amount of dividend declared.	95 per cent. of dividend, being the whole amount paid to stockholders, &c.	5 per cent. of dividend retained as excise tax.
$750,000	$85,218	$45,000	5 p. c. of which is.....	$2,250 00
Profits over dividend declared....$			5 per cent. of which is.....	2,010 90
Total excise tax.....				4,260 90
			Per cent. of which is.....	$
Total excise tax.....				$

(Signed) A. J. RALSTON.

I, A. J. Ralston, do swear that the above account contains, to the best of my knowledge and belief, a true and faithful statement of all dividends declared due, or paid, by the said Pacific Insurance Company, and of the undivided profits thereof, together with the amount of taxes which have accrued thereon, or should accrue, and not accounted for, during the time, and according to the provisions of the act aforementioned.

(Signed) A. J. RALSTON.

Sworn and subscribed before me, this 31 day of August, 1866.

J. M. ASHER,
Assistant Assessor, Div. 5.

58 *Exhibit No.* 2.

(65.)

Return by banks, trust companies, savings institutions, insurance, railroad, canal, and turnpike companies, of dividends declared and paid or payable.

[Sections 120—122.]

Account of all dividends, in scrip or money, declared due, or paid to stockolders, to policy holders, or to depositors, by the managers of the Pacific Insurance Company, in the city of San Francisco, in the county of San Francisco, and first collection district of the State of California, with the amount of tax thereon deducted and withheld from the persons to whom said dividends were paid, and of all undivided profits of the said Pacific Insurance Company, from the first day of April, 1866, to the thirtieth day of June, 1866, both days inclusive, pursuant to an act entitled "An act to provide internal re-

venue to support the government, to pay interest on the public debt, and for other purposes," approved June 30, 1864, viz:

Capital.	Net gains since prior dividend.	Amount of dividend declared.	95 per cent. of dividend, being the whole amount paid to stockholders, &c.	5 per cent. of dividend retained as excise tax.
$750,000	$85,218 gold.	$45,000	5 p. c. of which is.....	$2,250 00
Profits over dividend declared....		$40,218	5 per cent. of which is....	2,010 90
Currency value 73 c.....			Total excise tax.....	4,260 90—gold.
		$116,737	5 per cent. of which is....	5,836 85
Total excise tax.....				$

(Signed) A. J. RALSTON.

I, A. J. Ralston, do swear that the above account contains, to the best of my knowledge and belief, a true and faithful statement of all dividends declared due, or paid by the said Pacific Insurance Co., and of the undivided profits thereof, together with the amount of taxes which have accrued thereon, or should accrue, and not accounted for, during the time, and according to the provisions of the act aforementioned.

(Signed) A. J. RALSTON.

Sworn and subscribed before me, this 31 day of August, 1866.

J. M. ASHER,
Assistant Assessor, Div. 5.

59 (64.)

Exhibit No. 3.

Monthly return of all insurance companies, (except life,) whether inland or marine, of premiums and assessments.

Account of premiums and assessments received by the Pacific Insurance Company of the city of San Francisco, in the county of San Francisco and State of California, together with the amount insured, during the month of July, 1866, pursuant to the provisions of an act entitled "An act to provide internal revenue to support the government to pay interest on the public debt, and for other purposes," approved June 30, 1864, viz:

	Amount insured.	Received.	Rate of tax.	Amount of tax.
Premiums.....	5,737,894	74,409	1½ per cent.	1,116
Assessments.....	.....	.....	1½ per cent.	.....

(Signed) A. J. RALSTON,

I, A. J. Ralston, do swear that the above account contains according to the best of my knowledge and belief, a true and faithful statement of the amount of insurance made, renewed or continued, or endorsed upon any open policy, by said company or their agents, with the amount of premium received therefor, and the amount of receipts for assessments, during the month of July, 1866, according to the provisions of the act aforesaid.

(Signed) A. J. RALSTON.

Sworn and subscribed before me, this 31 day of August, 1866.

J. M. ASHER,

Assistant Assessor 1 *Collection District Cal'a, Div.* 5.

60 (64.)

Amended complaint.—Exhibit, No. 4.

Monthly returns of all insurance companies (except life) whether inland or marine, of premiums and assessments.

Account of premiums and assessments by the Pacific Insurance Company of the city of San Francisco, in the county of San Francisco, and State of California, together with the amount insured, during the month of July, 1866, pursuant to the provisions of an act, entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," approved, July 30th, 1864, viz:

	Amount insured.	Received.	Rate of tax.	Amount of tax.
Premiums	5,737,894	74,409	1½ per cent.	1,116 00—gold.
Assessments			1½ per cent.	
Currency value, 73 c.		101,927	1½ per cent.	1,528 93

(Signed) A. J. RALSTON.

I, A. J. Ralston, do swear that the above account contains, according to the best of my knowledge and belief, a true and faithful statement of the amount of insurance made renewed, or continued, or endorsed upon any open policy by said company or their agents, with the amount of premium received therefor, and the amount of receipts for assessments during the month of July, 1866, according to the provisions of the act aforesaid.

(Signed) A. J. RALSTON.

Sworn and subscribed before me, this 31 day of August, 1866.

J. M. ASHER,

Ass. Assessor 1 *Coll. Dis't Cal'a, Div.* 5.

The conversion of gold into currency is made under protest.

A. J. RALSTON.

Service of the within amended complaint acknowledged, and consent given to its being filed as a substitue for the original com-
61 plaint. Notice for leave to amend being waived, October 15, 1866.

DELAS LAKE, *Deft's Att'y.*

Endorsed: Filed, October 15, 1866. G. C. Gorham, clerk.

62 *Demurrer to amended complaint.*

Circuit court of the United State, 10th district.

THE PACIFIC INSURANCE COMPANY, plaintiff,
against.
FRANK SOULE, defendant.

And the said defendant, by Delas Lake, his attorney, comes and defends the wrong, &c., and injury when, &c., and says, that the said amended complaint, and the matters therein contained in the manner and form, as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain the aforesaid action thereof against the said defendant, and he, the said defendant, is not bound by law to answer the same. And this, the said defendant is ready to verify.

Wherefore, by reason of the insufficiency of the said amended complaint in this behalf, the said defendant prays judgment, and that the said plaintiff be barred from having or maintaining
63 the aforesaid action against him.

Dated at San Francisco, October 15th, 1866.

DELAS LAKE, *Att'y for Def't.*

We hereby admit service of a copy of the within demurrer, October 15th, 1866.

WILSON & CRITTENDEN,
& J. B. HARMAN, *for Pl'ff.*

Endorsed: Filed, Oct. 15, 1866. G. C. Gorham, clerk.

Minutes U. S. circ't court, Oct. 15, 1866.

At a stated term of the circuit court of the United States, Monday 15th day of October, A. D. 1866. Present, Hon. Stephen J. Field, associate justice of the supreme court, and presiding judge, and Hon. Ogden Hoffman, dis't judge.

THE PACIFIC INSURANCE CO., pl'ff,
vs.
FRANK SOULE, def't.

Argument on the demurrer to the amended complaint heard, submitted, and taken under advisement.

Certificate division of opinion.

64 UNITED STATES OF AMERICA, *District of California:*

At a circuit court of the United States, begun and held at the city of San Francisco, for the district of California, (9th circuit,) on Thursday the 18th day of October, A. D. 1866.

Present: The Honorable Stephen J. Field, associate justice of the supreme court and presiding judge, and the Honorable Ogden Hoffman, district judge.

State of the pleadings.

THE PACIFIC INSURANCE COMPANY, plaintiff,
vs.
FRANK SOULE, defendant.

This is an action to recover the sum of seven thousand three hundred and sixty-five 68-100 dollars, ($7,365 68-100) paid by the plaintiff, under protest, to the defendant, as collector of internal revenue.

The following are the facts stated in the plaintiff's complaint, and admitted by the defendant's demurrer.

The plaintiff is a corporation engaged in the business of insurance.

65 The assistant assessor of internal revenue for the district in which the plaintiff's office is situated, appointed under the act of the first of July, 1862, entitled "An act to provide internal revenue to support the government and to pay interest on the public debt," and subsequent acts upon the same subject, having demanded of the plaintiff an account or return of the amounts insured, renewed, or continued, the gross amount of premiums received, and assessments collected by the plaintiff for the month of July, 1866, and the duties accruing thereon, under the provisions of section one hundred and five (105) of the act of Congress, approved June 30th, 1864, entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," and also demanded a list or return of the amount of taxes levied by section one hundred and twenty (120) of the same act, or by the amendment thereto, made by the act of July 13th, 1866, upon

66 dividends, undistributed sums, and income for the preceding quarter, the plaintiff on the 31st of August, 1866, made out and delivered to said assistant assessor, in due form and properly verified, the two several lists or returns required, which showed that the amount of premiums received was the sum of $74,409, and the tax thereon, at the rate of 1½ per cent, was the sum of $1,116; and that the amount of dividends declared and net gains undistributed was the sum of $85,218, and that five per cent. thereof was the sum of $4,260 90-100, making the aggregate of tax or duty under said sections the sum of $5,376 90-100.

The amount of said premiums, dividends, and net gains, were truly stated in said lists or returns, according to their values in coined money, that being the currency in which the moneys had been received by the plaintiff.

The assistant assessor then added to said amounts the alleged difference between legal tender currency and coined money during the time covered by the returns, thus making the amount of premiums, received the sum of $101,929, and 1½ per cent. thereon, the sum of $1,528 93-100, and the amount of dividends declared and net gains

undistributed, the sum of $116,737, and five per cent. thereon
67 the sum of $5,836 75-100; and delivered the lists, with the amounts so increased, to the defendant, who is the collector of internal revenue, under said acts of Congress, for the district in which plaintiff's office is situated.

The addition to the amounts shown by the original lists was made without the consent and against the protest of the plaintiff, of all which the defendant had notice.

The defendant then demanded of the plaintiff payment of said two sums of $1,528 93-100 and $5,836 75-100, amounting in the aggregate to the sum of $7,365 68-100.

The plaintiff refused to pay that sum, but tendered to the defendant in payment and satisfaction of the amount claimed to be due upon the two lists the sum of $5,376 90-100 in United States notes issued under authority of the act of the Congress of the United States, approved February 25th, 1862, entitled "An act to authorize the issue of United States notes, and for the redemption or fund-
68 ing thereof, and for funding the floating debt of the United States."

The defendant refused to receive the amount tendered, and for the collection of the full amount demanded by him, seized and took into his possession, and advertised and offered for sale, and was about to sell certain goods of the plaintiff, who, thereupon, under protest, paid the full amount, and commenced this action to recover it back.

To this complaint the defendant demurs generally, and the plaintiff joins in demurrer.

This case coming on to be argued at this term, the following occurred as questions, to wit:

1st. Whether that portion of the ninth (9th) section of the act of Congress approved July 13th, 1866, entitled "An act to reduce internal taxation, and to amend an act, entitled An act to provide internal revenue to support the government, to pay interest on
69 the public debt, and for other purposes," approved June thirtieth, eighteen hundred and sixty-four, and acts amendatory thereof, which provides as follows, to wit:

"That it shall be the duty of all persons required to make returns or lists of income, and articles or objects charged with an internal tax, to declare in such returns or lists, whether the several rates and amounts therein contained are stated according to their values in legal tender currency, or according to their values in coined money; and in case of neglect, or refusal so to declare to the satisfaction of the assistant assessor receiving such returns or lists, such assistant assessor is hereby required to make returns or lists for such persons so neglecting or refusing, as in cases of persons neglecting or refusing to make the returns or lists required by the acts aforesaid, and to assess the duty thereon, and to add thereto the amount of penalties imposed by law in cases of such neglect or refusal. And whenever the rates
70 and amounts contained in the returns or lists as aforesaid, shall be stated in coined money, it shall be the duty of each assessor receiving the same, to reduce such rates and amounts to their

equivalent in legal tender currency, according to the value of such coined money in said currency, for the time covered by said returns. And the lists required by law to be furnished to collectors by assessors shall in all cases contain the several amounts of taxes or duties assessed, estimated, or valued, in legal tender currency only," is to be construed as merely providing a rule as to the currency in which accounts, returns, and lists are to be stated, with a view to uniformity in keeping the accounts of internal revenue, or whether it is to be construed as denying to a person who has received in coined money income or other moneys subject to tax or duty, the right to return the amount thereof in currency in which it was actually received, and to pay the tax or duty thereon
71 in legal tender currency, and be construed to require that the difference between coined money and legal tender currency shall be added to his return when made in coined money, and that he shall pay the tax or duty upon the amount thus increased.

2d. Whether there does not exist between the government of the United States and the holder of notes of the United States, issued under authority of the act of Congress approved February 25th, 1862, entitled "An act to authorize the issue of United States notes and for the redemption or funding thereof, and for funding the floating debt of the United States," a contract that said notes shall be receivable, dollar for dollar, as the equivalent of coined money, in payment of duties and taxes of the character of those collected from the plaintiff in this case.

3d. Whether the portion above referred to of the ninth sec-
72 tion of said act of Congress, approved July 13th, 1866, if it be construed as making a distinction between coined money and United States notes issued under authority of the act of February 25th, 1862, above referred to, and as requiring the plaintiff to pay duty for its receipts in coined money upon a larger sum than that actually received, is not an act impairing the obligation of a contract between the United States and the plaintiff, as the holder of such notes?

4th. Whether Congress possesses the power to destroy or repudiate, or impair the obligation of the contract between the United States and the plaintiff, as the holder of such notes?

5th. Whether the United States notes, issued under authority of said act of Congress of February 25th, 1862, and held by the plaintiff, are not private property, within the meaning of the 5th article of the amendments to the Constitution of the United
73 States, (proposed September 25th, 1789, and ratified December, 15th, 1791,) and whether the said portion above referred to, of the ninth (9) section of the act of Congress of July 13th, 1866, if construed, as making a distinction between coined money and legal tender currency, in respect to the payment of such duties as are referred to in this case, and construed as requiring the difference in the market value between coined money and legal tender currency to be added to the amounts stated in the returns made by the plaintiff, and requiring the plaintiff to pay the duty on such in-

creased amount, would not be the taking of private property for public use, without just compensation, and whether said act would not, in its application to the present case, be unconstitutional and void?

6th. Whether the taxes paid by the plaintiff, and sought to
74 be recovered back in this action, are not direct taxes, within the meaning of the Constitution of the United States?

7th. Whether the amount to be raised by such taxes is not required by the Constitution of the United States to be apportioned among the several States, and whether the acts of Congress above referred to, by which said taxes are levied and authorized to be collected without any such apportionment, but accordin to the rule of uniformity, are not contrary to the Constitution of the United States and void?

On each of these questions, the opinions of the judges were opposed.

Whereupon, on a motion of the plaintiff, by its counsel, that the points on which the disagreement has happened, may during the term, be stated under the direction of the judges, and certified under the seal of the court, to the Supreme Court, to be finally decided.

It is ordered, that the foregoing state of the pleadings and statement of facts, and questions made under direction of judges
75 be certified according to the request of the plaintiff by its counsel, and the law in that case made and provided.

October 18, 1866.

STEPHEN J. FIELD,
Associate Justice of U. S. Sup. Court.
OGDEN HOFFMAN,
Dist. Judge of Cal'a.

76 UNITED STATES OF AMERICA,
District of California, ss:

I, George C. Gorham, clerk of the circuit court of the United States for the district of California, ninth circuit, do hereby certify the foregoing transcript contains the original writ of certiorari from the United States Supreme Court, and the order and certificate of the judges of the United States circuit court for the district of California thereon, together with full, true, and correct copies of the records, files, and papers referred to in said order. As also the certificate of division of said judges in the cause entitled The Pacific Insurance Company against Frank Soule, as the same appears on file and of record in said court.

In witness whereof, I hereunto set my hand and affix the seal of said circuit court, at the city of San Francisco, this the twenty-seventh day of July, A. D., 1867.

GEORGE C. GORHAM, *Cl'k.*
Pr. JOHN A. WHEELER, *Deputy.*

Supreme Court of the United States.

No. 43.—DECEMBER TERM, 1868.

THE PACIFIC INSURANCE COMPANY, PLAINTIFF,

vs.

FRANK SOULÉ, COLLECTOR OF INTERNAL REVENUE.

BRIEF FOR PLAINTIFF.

The facts of this case, and the questions arising thereon, are fully stated in the certificate of the division in opinion between the judges of the circuit court of the United States for the district of California.

This case, as a supposed original suit in that court, was dismissed at December term, 1866, on the authority of the decision in the case of the Merchants' Insurance Company *vs.* Ritchie, (5 Wallace, U. S. Rep., p. 541,) for want of jurisdiction. But, on suggestion of a diminution of record, it appears by the return that the suit was originally instituted September 22, 1866, in a State court, and was transferred to the circuit court of the United States on the petition of the defendant, a collector of internal revenue under the laws of the United States. (Printed Rec., p. 15–17.) The circuit court therefore acquired jurisdiction of the case by the express provision of section 67 of the act of July 13, 1866, (Laws of 1866, chap. 184, pp. 171–172,) and no objection to the jurisdiction of this court now exists.

The questions certified will be considered in their order.

FIRST QUESTION. This question is simply whether, in ascertaining the basis of taxation, and the amount of taxes to be paid thereon, the acts of Congress relating to the assessment and collection of internal revenue do not require coin values to be converted into legal-tender-currency values, by adding to the coin basis of taxation the difference between coin and currency. This the assessor has done in this case, and no attempt will be made to deny that a fair interpretation of the law required it to be done. This admission gives rise to the real questions in the case.

SECOND QUESTION. This question is, in substance, whether a contract does not exist between the United States and the holder of legal-tender notes that said notes shall be receivable, dollar for dollar, as the equivalent of coined money, in the payment of duties and taxes of the kind collected from the plaintiff in this case.

Of the truth of the proposition involved in this question there can be no doubt. It is admitted in effect by the Attorney General's brief, (page 3.) But unless this contract between the Government and the *note-holder* contains also a contract between the Government and the *tax-payer*, it will not avail the plaintiff in this case. This leads to a consideration of the third question.

THIRD QUESTION. This question involves the co-existence of the two contracts before named.

The plaintiff in this case occupies two distinct relations: one as note-holder, and the other as tax-payer.

The Government also occupies two different relations: one as debtor, and the other as the governing power.

By the issue of the legal-tender notes, it occupies the relation of a debtor to its creditors, and by them agrees to pay their holders—*dollars*, that is, *coin dollars;* for the note is only the authority to demand the ultimate payment of coin dollars.

By the imposition of taxes, in the exercise of the taxing power, it also occupies the relation of the governor to the

governed, that is, of the governing power to the citizen as a tax-payer.

Abstractly considered, these two relations are separate and distinct, and in themselves would not impose an obligation common to both, notwithstanding the identity of the Government as the party occupying these two different relations. But the co-existence of these two obligations of the Government, in these two different relations, both to the note-holder and to the tax-payer, whether these two relations co-exist in the same person or not, is created by the express terms of the contract made by the Government with the citizen when issuing the notes. That contract is in these words: "Such notes herein authorized shall be renewable in *payment of al taxes, internal duties, excises, debts, and demands of every kind due to the United States*, (except duties on imports,) and of all claims and demands *against* the United States, of every kind whatsoever, (except for interest on bonds and notes, which shall be paid in coin,) *and shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States*, (except duties on imports and interest, as aforesaid") "And such United States notes shall be received *the same as coin, at their par value*, in payment of any loans that may be hereafter sold or negotiated by the Secretary of the Treasury, and may be reissued from time to time, as the exigencies of the public interests shall require." (Act of February 25, 1862, sec. 1; Laws of 1861–2, ch. 33, p. 345.)

The undertaking between the Government and the citizen is, that in all transactions between the Government and the citizen, other than in the two excepted cases, the paper representative of the coin dollar shall be equivalent to the coin dollar, and in nothing more expressly than in regard to the subject of internal taxation in all its branches.

Taxation, and the payment of taxes, necessarily imply all the antecedent steps by which the amount of the taxes is to be ascertained. Two standards of value cannot have been intended to be used in different parts of the same process. This would be contrary to good faith, and a violation of the contract of the Government.

The Government, as the taxing power, agrees that it will receive at par the notes issued by it as a debtor, in payment of all internal taxes due to it as the taxing power. This agreement is made by it, both as debtor and as the taxing power. It is therefore estopped from regarding them as below par, for any purpose relating to the subject of internal taxation, including the assesment as well as the payment of that class of taxes. As to that subject, they must be treated as par; that is, coin or coin values, in determining the basis of taxation, cannot be treated as more valuable than the notes, because it is a mere evasion of the contract to say that will receive the notes at par in payment of taxes, while in assessing the taxes and determining the amount to be paid it can make their depreciation below par the basis of increased taxation. This is the same, *in effect*, as saying *they shall not be received at par in the payment of taxes.* This discrimination between coin and legal-tender currency, in determining the basis of taxation in this case, is equivalent, on the part of the Government, to a *partial repudiation of its contract.* In fact, it is the first insidious approach of a general repudiation of its obligations.

Whatever may be the difference between the value of the coin dollar and the paper dollar, in the dealings between citizen and citizen, as between the Government and the citizen, in the matter of taxation, a coin dollar is no more valuable than a paper dollar. Any difference in value between them cannot, therefore, be made the legitimate basis of increased taxation.

Is the importer, who buys for gold and sells for gold, and who pays his taxes to the Government in gold, as required by law, in determining the amount of his income-tax, to be subjected to additional tax by reason of the difference of value between the gold dollar and the paper dollar? This, I imagine, will not be pretended, and yet it involves the same principle involved in this case.

If this be so, then the third question must be answered in the affirmative, in regard to the plaintiff, both as a tax-payer and as a note-holder.

FOURTH QUESTION. This question also must be answered in the affirmative. It is essentially nothing more nor less than the question whether the United States has the power to "destroy, repudiate, or impair the obligation of its *own contracts.*"

This question, it will be observed, is entirely different from the question sometimes discussed, viz, whether the United States, in the exercise of its general legislative power, may not pass laws, the effect of which will be, directly or indirectly, to impair the obligation of contracts between citizen and citizen, and do so with impunity, because they are not expressly prohibited by the Constitution from so doing. There the question is simply one of legislative power, and concerns the relations of the governing power to its subjects, the citizens, in the exercise of its general legislative powers.

The question under consideration, on the contrary, relates to the power of the United States, as a contracting party, to repudiate or impair the obligation of *its own contracts.* It is true, there is no express prohibition in the Constitution prohibiting the United States from doing so. But no such prohibition is needed. This is a Government of law and of good faith, and such an express prohibition is no more needed than one forbidding robbery or theft. The sacredness of the contracts of this Government is guarantied by the *moral law*—a law paramount to all constitutions and laws of human enactment—a law which is in fact the basis of all law and government, and the only true measure of either individual or national power in social affairs.

But whether this court is yet prepared to acknowledge and declare this fundamental doctrine or not, it may nevertheless be safely argued, on principles already admitted, that a law made in violation of the obligations of a solemn contract of the United States is void; because, *pro hac vice*, and as between the antecedent contract and the subsequent law, *the contract is the higher law of the case*, and must be so declared by this court; otherwise, this Government will cease to be one of justice, fortified by law, and become one merely of organized force.

The rights and obligations of the Government as a *legislator*

and as a *contractor* are entirely different, and must not be confounded. As a contractor, its rights and obligations must be determined, like those of the citizen, *by the law of the contract.* Its powers as a legislator cannot, in a government of law, be allowed to alter or change at its will and pleasure its rights and obligations under a contract.

As between laws, other than fundamental laws, governing the conduct of the citizen or subject, the latest law must govern. But, as between a contract of the Government itself, made in its character as a contracting party, and a later law made in conflict with it, according to all the requirements of good faith, and to the true theory and principles of our Government, the prior contract, in its own case, as in a case between citizen and citizen, must be declared to be the paramount law of the case.

This is an important and necessary application and extension of the principles governing in cases of the conflict of laws, which have heretofore been applied by this court in cases of constitutional law.

As to the extent and importance of contract law in modern jurisprudence, see Maine's Ancient Law, London edition of 1861, pp. 304, 306, 309.

FIFTH QUESTION. An affirmative answer to this question must also be made, as the necessary consequence of what has already been said on the other questions.

SIXTH AND SEVENTH QUESTIONS. These two questions raise the joint question, whether income taxes, such as those levied upon and paid by the plaintiff in this case, are not *direct taxes*, in the sense of the Constitution, and therefore *unconstitutional*, because not apportioned among the several States in the ratio of representative numbers.

The plaintiff in this case is a corporation. It is an artificial person, and becomes such by acquiring "the attribute of *individuality* conferred upon a changing body of men," and, for all purposes of business, is *a person.*

The revenue laws in question tax the whole business of the

corporation by percentage taxes levied upon the whole amount of premiums received, and upon the whole amount of dividends declared, and net gains undistributed by the company.

These taxes, therefore, are purely *income taxes* and nothing else. No better illustration of an income tax can be given than that furnished by the taxes levied upon the plaintiff and other corporations by the internal revenue laws.

In the nature of things, an income tax levied on a corporation is a *direct tax*, as much so as a *poll tax*, or a *land tax*, levied against an individual, because it is as direct in its application, and is as general in its scope and operation. *Poll taxes*, by the express definition of the Constitution, and *land taxes*, by the nature of the thing, and by the practice of the Government, are admitted to be direct taxes. If income taxes, whether levied upon individuals or corporations, are in their nature as *direct* in their application as either of these, then it must be admitted that income taxes also are direct taxes.

The learning and authorities on this subject will be found in the elaborate argument of Mr. W. O. Bartlett, of New York, which I print for information of the court, as an appendix to my argument (See p.) While studying the case, I found this argument, and seeing that it completely exhausts the subject, I have concluded to adopt it substantially as my own argument on this branch of the case.

The distinction between *direct* and *indirect* taxes was well known to political economists, and to the laws of England, from which we derive our jurisprudence, at the time of the adoption of the Constitution of the United States. It must, therefore, be regarded as having adopted that distinction in the sense in which the distinction was then used.

The ordinary test of the difference between *direct* and *indirect* taxes, is whether the tax falls ultimately on the tax-payer, or whether, through the tax-payer, it falls ultimately on the consumer. If it falls ultimately on the tax-payer, then it is *direct* in its nature, as in the case of poll taxes and land taxes. If, on the contrary, it falls ultimately on the consumer, then it is an *indirect* tax. Now, it is obvious that an income-tax, levied on the profits

of any business, does not fall ultimately on the consumer or patron of that business, in any other sense than that in which a poll tax or land tax may be said ultimately to fall, or be charged over by the payer of those taxes upon the persons with whom and for whom they do business, or to whom they rent their lands.

This degree of refinement abolishes the whole distinction, and in this way all taxes may be regarded as *direct* or *indirect*, at pleasure.

But, if the distinction is recognized, (and it must be, for the Constitution makes it,) then it follows, that an income tax is, and always heretofore has been, regarded as being a direct tax, as much so as a poll tax or as a land tax. If it be a direct tax, then the Constitution is *imperative* that it shall be *apportioned.*

But it may be argued that an income tax *cannot* be apportioned. If that be true, then, it cannot be levied; for only such direct taxes can be levied as *can* be apportioned.

But it is not true that an income tax cannot be apportioned. It can be apportioned as easily as any other direct tax; first, by determining the amount to be raised from incomes throughout the United States, and then by ascertaining the proportion to be paid by the people of each State. An income tax, in the matter of its apportionment, is not embarrassed by any other difficulties than those which grow out of apportionment, in the admitted cases of poll taxes and land taxes.

If these views be correct, then the sixth and seventh questions must also be answered in the affirmative.

JOHN A. WILLS,
Attorney for Plaintiff.

APPENDIX.

THE INCOME TAX

IS THE TAX CONSTITUTIONAL?

MR. BARTLETT'S ARGUMENT.

The Constitution of the United States (article 1, section 2) provides that "Representatives and direct taxes shall be apportioned among the several States which may be included within the Union according to their respective numbers." This is plain. Its meaning is unmistakable. According to the established rules of legal interpretation it forbids, by necessary implication, the levying of any direct tax not so apportioned. But the framers of the Constitution were particularly jealous of the exercise of the power of direct taxation by the General Government. The saw fit to surround it with extraordinary safeguards. They did not trust the prohibition to lay direct taxes, save in the manner specified, to mere inference, however clear the implication might seem to be. In the ninth section of the same article they state this prohibition in terms, as follows: "No capitation or other direct tax shall be laid unless in proportion to the enumeration hereinbefore directed to be taken." The income tax is not so apportioned. Is it a direct tax? If it is a direct tax, not being so apportioned, it must be unconstitutional.

An income tax is not of so recent origin that there has not been sufficient time and opportunity for its nature and character, and the description of tax to which it belongs, to become fully understood. We have but to open the book of history to study it in the light of centuries. More than a thousand years ago it was one of the chief causes of the destruction of the mightiest Power on earth. The Roman empire fell under the oppressive weight of direct taxes, and of all those taxes a capitation tax, proportioned to revenue or income, seems to have been the most abhorred and the most dreaded. (Hume's

"Essays," I., 355, 356; "Gibbon's Decline and Fall of the Roman Empire," vol. ii., 149, 150; Zozimus, 1, ii., p. 115.)

Rulers in former times clung to this species of tax as a convenient, serviceable instrument of tyranny. Gradually, as nations gained their freedom, they shook it off. It may well retire before the march of civilization, for every where it is the prolific mother of fraud and perjury, and the dutiful handmaid of the father of lies. Prying, inquisitorial, impudent, offensive, odious in its nature, it consorts not with liberty. An official investigation into the operation of the income tax in England discovered an extent of fraud attending its collection which shocked the religious sense of the country. It had developed an elasticity of conscience far exceeding the proverbial latitude of custom-house oaths. A few made scrupulously correct returns under the law, but the great majority exhibited a degree of modesty in stating their incomes, which would have been more becoming in a self-made estimate of their virtues; while many an insolvent debtor sought to bolster up his tottering credit by swearing to an exaggerated representation of the profits of his business. The law had worked as it were a special device of Satan—a broad and easy road—leading both ways into temptation.

A TAX ON HONESTY.

McCulloch—not our Secretary of the Treasury, but the distinguished English writer on political economy—remarks:

"Most persons have the greatest dislike to the payment of direct taxes; and though occasionally a few individuals may be found, who, either from a wish to be thought richer than they really are, or from a desire to quiet the suspicions of their creditors, return their incomes beyond their real amount, the vast majority endeavor to conceal and underrate them. * * * And it is next to impossible to defeat the machinations of such persons by instituting an examination into the state of their affairs. In very many cases such an examination can lead to no satisfactory results; and the commissioners employed to assess the tax must either accept the returns sent by those parties whose revenues are not derived from visible and easily-appreciated sources when verified by their oath, or they must be authorized to assess them according to their own notion of what is right and proper. If the former criterion is adopted, everything is made to depend on the honor of the parties, so that the tax will be made to fall with its full weight upon men of integrity, while the millionaire of easy virtue may well-nigh escape it altogether. Hence it may truly be

said to be a *tax on honesty, and a bounty on perjury and fraud.* * * * Taxes on income are also, in other respects, exceedingly objectionable. They require a constant interference with and inquiry into the affairs of individuals, and in this way, independently of inequality, keep up a perpetual feeling of irritation. * * * Such inquiries and disclosures must necessarily always be hateful to the parties, and cannot fail to excite their disgust." (Treatise on Taxation, pp. 125, 126, 134.)

It might well be urged, that a nation has no right to adopt or retain a system of taxation the inevitable tendency of which is to corrupt the moral sense of the people. I do not, however, propose to pursue at length the moral bearings of the subject, but chiefly to discuss the question whether, under our Government, an income tax, not apportioned among the States according to the census, is constitutional? Is the income tax a capitation or other direct tax? This inquiry involves the whole question of its constitutionality.

IS THE INCOME TAX A CAPITATION TAX?

Is it a capitation tax? What is a capitation tax? It is thus defined in Bouvier's Law Dictionary:

"*Capitation*—A poll tax; an imposition which is yearly laid on each person, according to his estate and ability."

Dr. Adam Smith, than whom there is no higher authority on this subject, says:

"*The taxes which it is intended should fall indifferently upon every species of revenue are capitation taxes* and taxes upon consumable commodities. These must be paid indifferently from whatever revenue the contributors may possess: from the rent of their land, from the profits of their stock, or from the wages of their labor."

This certainly seems to be an accurate and complete description of our income tax; and it is pertinent to remark, that Adam Smith was in great repute as a writer upon political economy at the time of the formation of our Government, and is often quoted in the speeches and writings of the architects of the Constitution, so that they were likely to have reference to his work in the use of the phrase, "*capitation* or other direct tax," in that instrument.

The popular, prevailing idea in this country of a capitation or poll tax seems to be, that it is always equal—so much on a head; and it has been the practice of the States which have levied such taxes to make them uniform upon the classes of persons on which they were imposed. But uniformity is no

necessary ingredient or characteristic of a capitation or poll tax. In the Old World capitation taxes have not generally been equal or uniform. "Historians inform us," says Hume, in his Essay on Taxes, "that one of the chief causes of the destruction of the Roman State was the alteration which Constantine introduced into the finances, by substituting a universal poll tax in lieu of almost all the tithes, customs, and excises which formerly composed the revenue of the empire." Yet what are here spoken of as poll taxes were proportioned to the gains, profits, or incomes of persons. (Gibbon's "Decline and Fall of the Roman Empire," as above.) In England poll taxes were at first levied upon certain classes "at three shillings in the pound of their supposed income," and subsequently upon the same and other classes according to their rank. (Smith's "Wealth of Nations," p. 236.) In France during nearly all the eighteenth century capitation taxes were levied on the higher classes according to their rank, and on the lower orders according to their supposed fortune, by an assessment which varied from year to year. (*Ibid.*) In france in 1695 the capitation tax varied in amount from about five cents to about four hundred dollars. (Journal du Palais, vol. ii, p. 826.)

I have raised the question, but I do not deem it necessary to determine, whether or not, within the meaning of the Constitution, the income tax is a capitation tax? The larger branch of the inquiry—is it a direct tax?—seems to me to dispose of the point of its constitutionality. Is it a direct tax? If it is a direct tax, whether or not it be a capitation tax, not being laid in proportion to the census, it must still be unconstitutional.

In order to decide correctly this question—which is really the only issue—I propose to refer to the following sources of information:

First. The lexicography of the standard writers on political economy.

Secondly. The doctrine of France, a country most familiar, from experience, with this kind of tax.

Thirdly. The debates in the British Parliament.

Fourthly. The understanding of the meaning of the term *direct taxes* by the framers of the Constitution.

Fifthly. The decisions of the Supreme Court of the United States.

No one can say that these are not high and competent authorities; and if we find that they all substantially agree may we not consider the matter settled?

WHAT IS A DIRECT TAX?

What, then, is a direct tax? Adam Smith sets forth a tax upon a person's *revenue*—which is but another name for his *income*—to be a direct tax. (Wealth of Nations, vol. 3, p. 331.)

J. R. McCulloch divides his work on taxation into two parts: Part I on direct taxes, and Part II on indirect taxes; and under the head of "*direct taxes*" he treats of "taxes on property and *income*."

James Mill, under the title of "*direct* taxes, which are designed to fall upon all sources of *income*," says: "Assessed taxes, poll taxes, and *income taxes*, are of this description." (Elements of Political Economy, p. 267.)

Say defines a direct tax to be the "absolute demand of a specific portion of an individual's real or supposed revenue." (Political Economy, p. 466.)

John Stuart Mill says: "Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. *Direct* taxes are either on *income* or expenditure. Most taxes on expenditure are indirect; but some are direct, being imposed, not on the producer or seller of an article, but immediately on the consumer." And this writer, of acknowledged authority, proceeds to an elaborate discussion of the subject of *income tax*, under the head of *direct taxes*. (Political Economy, vol. 2, pp. 371–382.)

Dr. Lieber, referring to the different modes of levying taxes, says: "The first way is direct, to determine from the statement of the parties concerned, or from official information, the net *income* of persons. This kind of taxes is called direct. (Encyclopedia Americana, vol. 7, p. 155.)

Taxes are usually divided into direct and indirect; the former include assessments made upon the real or personal estate of the tax-payer, upon his *income* or upon his head. (New American Cyclopedia.)

France had a long and bitter trial of the income tax, extending through the last century almost down to its close. Probably it is from the thorough knowledge thus acquired of its operation that she has become unalterably fixed in her opposition to it. Efforts have been made to restore it; but in vain. She submits to changes of dynasty; to changes in the form of government; and submits to many kinds of oppression; but to this one species of tyranny she seems fully determined that she will never again submit. Of course the

subject of income tax has been largely, learnedly, and ably discussed in France, and it has invariably been regarded, both by its advocates and opponents, as a direct tax. It is treated of as a direct tax in an exhaustive discourse on the subject of taxation recently delivered before the French *cour des comptes* by Count Casabianca, the distinguished procureur general, which is at present attracting considerable attention in other countries as well as his own.

Let us next turn to England. Her ideas of political economy are derived mainly from the same sources as our own. She laid an income tax as early as 1797. It speedily aroused the popular displeasure, and when, two years later, an income tax was reimposed by William Pitt, the measure was so odious that his carriage was mobbed on his way home from the House. From its very enactment it encountered a powerful opposition, which gained zeal and strength, enrolling within its ranks the highest talent and most splendid oratory of the country, until the repeal of the tax, in 1816, which, the historian informs us, took place "amid huzzas only equalled by those which greeted the fall of Waterloo." (Alison.)

There is a deep-rooted and general sentiment in England against an income tax, except in time of war, or as immediately following a war, specifically for defraying its expenses. On one point there is no difference of opinion whatever in that country, and that is that it is a *direct* tax. When Sir Robert Peel brought forward his plan for an income tax in 1842, he said: "*Indirect* taxation has reached its limits, and can no longer be relied on. My plan is this, to levy an income tax," &c. ("Parliamentary Debates," lvi., 428; "Ann. Reg.," 1842, 72, 73.) And Lord John Russell said in reply: "To resort to the desperate measure of an income tax in such circumstances is nothing less than to proclaim to the world that your resources are exhausted, that indirect taxation has reached its limits," &c. ("Parliamentary Debates," lvii. 86, 147; "Ann. Reg.," 1842, 77, 79.)

In the Parliamentary debates on the subject of income tax—and there are few which have elicited more eloquence—extending over more than half a century, in which at different times such men as Pitt, and Pulteney, and Castlereagh, and Madocks, and Tierney, and Baring, and Brougham, and Peel, and Russell have participated—by all these British statesmen has the income tax been always spoken of as a direct tax.

Thus we see that the lawyers and statesmen of France and England agree with the political economists that an income tax is a direct tax.

Our next inquiry is whether the framers of the Constitution understood the meaning of the phrase *direct tax* when they employed it in that instrument, and what they understood its meaning to be. There is good reason to believe that they understood it perfectly. They were an intelligent body of men. Among them were scholars and lawyers and statesmen. They were met together to make sure the foundations of a Government resulting from a revolution which had its very origin in unjust taxation. In the Declaration of Independence they had made this conspicuous among the reasons on which they relied to justify them in the opinions of mankind for renouncing allegiance to the mother country. If there was any subject which they were bound to understand it was the subject of taxes. It occupied much time and attention in the convention. The provisions of the Constitution are different from those of the old Articles of Confederation. They were deliberately considered, carefully worded, and fully debated. The phraseology was changed and amended from the original draft before their adoption. These provisions were regarded by all the States as of the greatest importance, and it was apprehended and believed that upon their just and correct settlement would depend the ratification of the Constitution by the States, and the efficiency and perpetuity of the Union about to be formed. Nay, more, the Confederation of the States, formed under the old articles of 1778, was at that very time crumbling and falling to pieces from the want of the proper adjustment of exactly this power of direct taxation.

THE CORNER-STONE OF THE CONSTITUTION.

It is no exaggeration to say that this is the foundation, the corner-stone of the Constitution. The present Constitution originated from the supreme necessity which had been experienced under the old Confederation of the power of taxation in the General Government. An experiment of nine years had proved that without this the Government could not go on. In the emphatic words of Mr. Madison, "the federal authority had ceased to be respected abroad; at home it had lost all confidence and credit."

The old Confederation depended for revenue upon requisitions on the several States, with which the States might comply or not, as they chose, and with which they generally did choose not to comply, either promptly or fully, if at all. This was the radical infirmity of the Confederation. James Madison reported the debates of the convention which framed the

Constitution, and in his introduction to those debates Mr. Madison says:

"The radical infirmity of the Articles of Confederation was the dependence of Congress on the voluntary and simultaneous compliance with its requisitions by so many independent communities, each consulting more or less its particular interests and convenience, and distrusting the compliance of the others." ("Elliot's Debates," v., 112.)

It was to cure this radical infirmity that the present Constitution was projected and formed. (*Ibid*, 112, 113.) Other great improvements, it is true, on the Articles of Confederation, were made in the Constitution when it came to be formed; but the most important of all was in the regulation of taxation. Alexander Hamilton, foremost among the progenitors of the Constitution, who drafted the address to the States inviting them to send delegates to the convention by which it was formed, wrote thus in *The Federalist:*

"The power of taxation is the most important of the authorities proposed to be conferred on the Union." (P. 285, J. C. Hamilton's edition.)

The necessity of conferring this authority upon the General Government had become obvious; yet there was no power which the people were more determined to guard, so that it could never be arbitrarily exercised. Of all political questions, there was none in which they had taken a deeper interest. It was the right which they prized most highly. The whole power of Great Britain had been humbled in the dust in an unsuccessful attempt to wrest it from them. The firm establishment of this right was the costly and precious fruit of the Revolution. The graves of those who had fallen in its defense were then fresh made. The scars which many of the survivors had received, if healed, were still visible and not forgotten. Washington, who presided over the Convention which formed the Constitution, had acquired his imperishable glory in the war begun for the maintenance of that right. The States naturally watched with scrutinizing jealousy the terms in which and the extent to which all authority which had been preserved at such cost was conferred upon the General Government; and the history of the times justifies the remark, that not one of them would have given its assent to the grant had it not been accompanied by the condition that no direct tax should be laid except in proportion to the census. Every assurance was given by the advocates and supporters of the Constitution that this provision could not by any possibility ever be violated.

It is evident from what has been said that the framers of the Constitution attached the greatest importance to the provision respecting direct taxation, and that they adopted it understandingly. What, then, did the framers of the Constitution mean by direct taxes? If we refer for an answer to the declarations of the very men themselves, and to the contemporaneous history, we shall have adhered to the rule of law which requires the best evidence of which the case admits. By such evidence I expect to show that the framers of the Constitution considered—

First. A tax on land to be a direct tax.

Second. A general assessment on property to be a direct tax.

I then expect to establish by legal decisions, that—

Third. If a tax on land be a direct tax, or if a general assessment on property be a direct tax, it follows, as an unavoidable consequence, that the income tax is a direct tax.

There were two parties in the federal convention, differing from each other principally in respect to the extent of the power which ought to be conferred on the General Government. If we find that the leaders of these two antagonistic parties agree perfectly as to the construction of this provision, may we not regard this as proof which cannot be controverted?

The ablest, most astute, most distinguished opponent of the Constitution in that convention was Luther Martin, a delegate from Maryland, at that time attorney general of the State, and for many years the great luminary of its bar. One of the fullest and most interesting reports ever made of the doings of that convention is contained in an address by Mr. Martin to the Maryland Legislature. It is entitled "The genuine information, delivered to the Legislature of the State of Maryland, relative to the proceedings of the General Convention held at Philadelphia, in 1787, by Luther Martin, Esq., Attorney General of Maryland, and one of the delegates in the said Convention." A part of this "genuine information" relates to the explanation given by the committee of detail, as it was called, that is, the committee appointed by the convention to draft the Constitution, as to the meaning of the provision about taxation. From their explanation, as stated by Mr. Martin, it appeared that by the word duties was meant stamp-duties; imposts applied to goods imported; excises in articles of use or consumption; while direct taxation was "either a capitation on their heads or an assessment on their property." (*Ibid*, I, p. 368.) The State of New York had in

that convention a delegate of great distinction, Alexander Hamilton, one of the brightest, clearest intellects of the revolutionary period, as strong in his advocacy of the Constitution as Luther Martin was in his opposition to it.

In the celebrated carriage case, Hylton *vs.* the United States, (3 Dallas, 171,) Mr. Hamilton appeared for the Government, and in the course of his argument he mentioned as taxes, which were to be considered direct taxes, capitation taxes, taxes on land and buildings, and general assessment. (See his brief in the case referred to.)

Thus we see these two great lawyers, leaders of the opposing parties, concurring in their construction of this provision of the Constitution, and in the opinion that *an assessment on property is a direct taxation.* My notes on the carriage case, which accompany this argument, contain ample and convincing evidence that those who framed and those who adopted the Constitution understood that direct taxes might be levied upon personal property as well as upon real estate.

That there can be no distinction, in point of law, between *a tax on property* of any kind and a tax *upon the income of the same property* will fully appear further on in this argument. Among the greatest men and the ablest constitutional lawyers in the early history of the Government stood Samuel Dexter, of Massachusetts. Here is his portrait, drawn by the master-hand of Daniel Webster:

"He was a lawyer, and he was also a statesman. He had studied the Constitution, when he filled public station that he might defend it; he had examined its principles that he might maintain them. More than all men, or at least as much as any man, he was attached to the General Government and to the Union of the States. His feelings and opinions all ran in that direction. A question of constitutional law, too, was, of all subjects, that one which was best suited to his talents and learning. Aloof from technicality, and unfettered by artificial rule, such a question gave opportunity for that deep and clear analysis, that mighty grasp of principle, which so much distinguished his higher efforts. His very statement was argument; his inference seemed demonstration."

Samuel Dexter, such as he is here portrayed, was in Congress in 1794, when arose the first discussion in that body as to what constitutes direct taxation. Mr. Dexter said: "His colleague (Mr. Sedgwick) had stated the meaning of direct taxes to be a capitation tax, or a general tax, on all the taxable property of the citizens, and that a gentleman from Virginia (Mr. Nicholas) thought the meaning was that all taxes

are direct which are paid by the citizen without being recompensed by the consumer; but that, where the tax was only advanced and repaid by the consumer, the tax was indirect. He thought that both opinions were just and not inconsistent, though the gentlemen had differed about them. He thought that a general tax on all taxable property was a direct tax, because it was paid without being repaid by the consumer." (Annals of Congress, 1793–5.)

I have endeavored to show that "direct tax," as a political and legal phrase, has a definite meaning, established by long and enlightened usage, both in the Old World and in the New, and that the phrase was understandingly used by the framers of the Constitution in that instrument.

Taxes on land and a general assessment upon property certainly have been held, and are held, by statesmen and lawyers, to be direct taxes. We shall now see that no valid and legal distinction can be made between a tax on land and a tax on the income of the same land, or between a general assessment upon property and a tax upon the income of the same property; and in considering this principle I come to the solid immovable rock on which I ground my whole argument; that is, to the adjudications of the tribunal of last resort for such questions in this country, the Supreme Court of the United States. These settle the whole matter beyond a doubt, and place it out of the reach of cavil.

DECISIONS OF THE SUPREME COURT.

In an early case (1796) the court laid down the doctrine that a tax on land is a direct tax in the following emphatic terms: "Both in theory and practice a tax on land is a direct tax." (Hylton *agt.* the United States, 3 Dallas, 171.)

Now, it will appear by other decisions of this court, and of other courts, that a tax on the income of land is in effect, and in law, the same thing as a tax on the land itself; and as the income tax is a tax on the income of land as well as the income of other property, it is in legal intendment and construction a tax on land, as well as on other property; a tax on land, a direct tax, and, being unapportioned according to the census, it is consequently unconstitutional and void.

It has long been well settled that "a devise of the income of land is in effect the same as a devise of the land itself." (9 Mass., 372; 1 Ashmead, 136.) So in the State of New York the same doctrine is held. (11 Wendell, 298; 17 Wendell, 402.) A devise of the rents and profits of land or the income of land is equivalent to a devise of the land itself.

(Washburn on Real Property, 2, 752, and cases there cited.) And the rule which has uniformly governed the Supreme Court of the United States is, that where any principle of law establishing a rule of real property has been settled in the State courts, the same rule will be applied by that court that would be applied by the State tribunals. (Jackson *agt.* Chew, 12 Wheaton, 153.) Thus it is the doctrine of the Supreme Court of the United States, as well as of the State courts, that a devise of the income of land is the same thing as a devise of the land. And the court has decided in several cases that in levying taxes, as well as in the devise of land, the substance, and not the form, must govern, and have pronounced illegal the various attempts which have from time to time been made to lay some prohibited tax by the mere evasion of the express words of the prohibition.

There is certainly more plausible ground for contending that there is a difference in principle between a tax on a bill of lading and a tax on the article shipped than for a distinction between a tax on the value of land and a tax on the income of land. Yet in the case of Almy *agt.* the State of California, (24 Howard, 174,) the Supreme Court of the United States held that a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is, in substance, the same thing; and that a law prohibiting a tax on the article shipped by necessary implication prohibits a tax on the bill of lading of the same article.

The State of Maryland undertook to levy a tax on the occupation of an importer, by requiring him to pay for a license to carry on his business; but Chief Justice Marshall decided that this was a tax on imports, and, being laid by a State, was unconstitutional and void. (Brown *agt.* Maryland, 12 Wheaton, 429.)

In another case the Supreme Court of the United States decided the exact question at issue here, whether a tax on the income of a thing is the same as a tax on the thing itself, and held that a tax which could not be legally levied on an office could not be legally levied on the income of the same office; from which it irresistibly follows, that if an unapportioned tax cannot constitutionally be laid upon land, it cannot constitutionally be laid upon the income of land. This was the case of Dobbins *agt.* The Commissioners of Erie County, in which the court decided that the emoluments of an office could not be taxed if the office was exempt. (16 Peters, 435.) If the decisions of the courts—of the highest State tribunals and of the Supreme Court of the United States—are to stand,

if a devise of the income of land is a devise of the land itself, if the tax on the income of an office is in effect the same as a tax on the office, then the income tax, being a tax on the income of property in general, is, in legal principle, the same thing as a general assessment on property; and being a tax upon the income of land, as well as of other property, is, in effect, a tax on land. It is a direct tax, and not being apportioned to the census, as the Constitution requires that all direct taxes must be apportioned, it is laid without the authority of the Constitution and against the authority of the Constitution, and, as has been decided by Chief Justice Marshall, "an act repugnant to the Constitution cannot become the law of the land." (Marbury *agt.* Madison, 1 Cranch, 137.)

The statute law of the United States, as well as the decisions of the courts, recognize real estate and the income of real estate to be the same thing. It accounts a succession to the income to be a succession to the real estate. This is done by the very act which imposes the income tax. Section 127 of that act lays a tax on the succession to real estate; and it defines a succession to real estate to be every disposition of real estate by reason whereof any person shall become beneficially entitled "to any real estate, or the *income* thereof."

CONSEQUENCES OF A DIFFERENT DOCTRINE.

The case might be safely rested here on the decision of the courts, but the matter is of such grave importance that it is worth while to pursue it somewhat further, and to consider what would be the consequences of a different and opposite doctrine. The States have generally assessed their taxes upon real and personal property, and have considered this direct taxation. (See report of Oliver Wolcott, Jr., Secretary of the Treasury, to Congress, on Direct Taxes, 1796.) George Nicholas, in the Virginia convention, in 1788, speaking of the State systems of taxation, said: "The public treasuries are supplied by means of direct taxes." (3 Elliot, 99.) The leading statesmen of a later date have regarded a general assessment on property—the prevailing mode of levying taxes in the States—as direct taxation. "The States have scanty resources without resort to heavy direct taxes." (Webster in the Hayne debate.)

I have already, I trust, established the point, by reference to judicial decisions, that if a general assessment on property is a direct tax, the income tax on the income of property in general is not less a direct tax. To controvert either branch

of this proposition both must be controverted. Let us examine in what predicament a reversal of the doctrine that a general assessment on property is direct taxation would leave the State of New York. The most important financial legislation of this State is based upon that principle. Our State constitution (article 7, sections 10–12.) provides that no debts—with certain exceptions therein specified—exceeding in amount $1,000,000, shall be contracted, unless in the law authorizing the same provision be made for the payment of the interest and of the principal within eighteen years by an annual direct tax. The State has uniformly construed the requirement for a direct tax to be fulfilled by a general assessment. If a general assessment be not a direct tax, the practice of the State of New York in this particular has been and continues to be wholly erroneous and unconstitutional. The State raised $27,000,000 of bounty money. It has no constitutional authority to raise money to pay the debt thus incurred, except by a direct tax. The only provision made for raising the money to pay it is by general assessment. If the general assessment be not a direct tax, every step which the tax-gatherer takes toward collecting that $27,000,000 of bounty money—either the principal or the interest—he tramples upon the constitution of the State. According to well-settled principles, there can be no distinction between a general assessment on property and a tax on the income of the same property. It follows that either the general assessment for the payment of the $27,000,000 of bounty money is not a direct tax, and is consequently a violation of the constitution of the State of New York, or the income tax is a direct tax, and, being unapportioned, is consequently a violation of the Constitution of the United States. If one is a direct tax both are direct taxes, and one or the other must inevitably be unauthorized. If the income tax is to be maintained, the legislation of the State of New York for paying the bounty loan cannot be amended too soon. The one is repugnant to the constitution of the State, or the other is repugnant to the Constitution of the United States. From this conclusion there is no escape. The only ground on which the unapportioned income tax can be held to be constitutional is, that a tax which would not be legal if laid on property may legally be laid on the income of the same property. Let us see with what mischief this principle would be fraught if introduced into State legislation. If it is sound and valid, as applied to the laws of the nation, it is equally sound and valid as applied to the laws of the States. Let us consider to what its adoption would lead. The States are prohibited from lay-

ing imposts or duties on imports or exports, except what may be "absolutely necessary" for executing their inspection laws. (Cons. U. S., art. 1, sec. 10.)

IT WOULD OVERTHROW THE GENERAL GOVERNMENT.

If the doctrine on which the income tax is founded is correct; if the United States, being prohibited from laying an unapportioned tax on land, can lay it on the income of land, then, by parity of reasoning, the States, which are prohibited from taxing imports and exports, may lay a tax of any amount on all incomes derived from imports and exports. The importance, the necessity of guarding against such subtle distinctions, existing only in form, in the exercise of the power of taxation, was apparent to Chief Justice Marshall when the subject first came judicially before him. To his comprehensive, sagacious, far-seeing mind, it was clear that the very existence of the General Government depended upon overruling these unsubstantial technical distinctions. In speaking of the attempt to evade the prohibtion to States of the right to *tax imports*, by nominally taxing the *occupation* of an importer, he said: "It is impossible to conceal from ourselves that this is varying *the form* without varying the substance. It is treating a prohibition which is *general*, as if it were confined to *the particular mode* of doing the forbidden thing." (12 Wheaton, 439.) And in the same case he said: "All must perceive that a tax on *the sale* of an article imported only for sale is a tax on the *article itself*." A very interesting attempt to lay an unconstitutional tax *by evasion* was made by the State of Maryland. The United States Bank, by authority of its charter derived from the General Government, established a branch bank in Maryland. Of course, the State could *not tax this branch;* otherwise it might tax it out of existence, and destroy, or seriously impair, within its own limits, the power of the General Government to borrow money. The State tried to evade the prohibition by *imposing the tax* on *the bills of the branch bank.* The Supreme Court decided that the tax on the bills was substantially the same thing as a tax on the bank. Chief Justice Marshall, with characteristic penetration, perceived that the question involved a principle vital to the nation. He said:

"If we apply the principle for which the State of Maryland contends to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the Government, and of prostrating it at the feet of the States. The

American people have declared their Constitution and the laws made in pursuance thereof to be *supreme;* but this principle would transfer the supreme power, in fact, to the States." (Brown *vs.* Maryland, 12 Wheaton, 439.)

The State of Maryland could have carried out the principle for which it contended just as mischievously and just as destructively to the national credit and the national power *by taxing* the income as by taxing the bills of the bank; and if the income tax is constitutional this could have been done.

THE INCOME TAX THE FIRST FORM OF NULLIFICATION.

Not only have other and similar shallow distinctions been tried in the name and style of levying a tax for the purpose of evading the law, but the precise one adopted by Congress in laying the income tax is not new. It was the form which nullification first assumed in the city of Charleston—its hotbed. If the principle of the income tax had been acquiesced in by the Supreme Court at that time, there would have been no occasion even for States that wished a separation to resort to rebellion. They could have expelled the United States Government from their territory without ever firing a gun. And if the principle which was rejected there is to be adopted now, the blood and treasure expended in the war have been spent for naught. We have a judicial decision of the question as it arose at that time. It came up in this way: The city council of Charleston, by authority of its charter, derived from the State of South Carolina, passed an ordinance which is thus described by Judge Johnson, of the Supreme Court: "It is true the act of the city of Charleston which imposes this tax is most clumsily worded. But I think it clear that, taken together, the object is to impose an income tax." And thus, by his associate on the bench, Judge Thompson: "It is a tax upon the net income of interest upon money secured by bonds, notes, insurance stocks, six and seven per centum stock of the United States, or other obligations on which interest has been received. * * * It is, therefore, a general tax upon income of money at interest," &c. Chief Justice Marshall and a majority of the court held that this taxing of the net income of United States stock was simply one method "of taxing and opposing the power of the Government to borrow money." The Supreme Court, in this case, decided that when a State was prohibited from laying a tax on United States stock, it could not evade the prohibition by laying the tax on the income of the same and of other stocks. The same court has decided (3 D., 171) that the General

Government is prohibited from laying an unapportioned tax on land; and it would seem to follow that this prohibition cannot be evaded by laying the tax on the income of land and of other property, as is attempted by the present income tax.

IT WOULD MAKE STATES SUPREME.

If the United States could evade the decision of the Supreme Court by laying the tax on the income of the land, which is prohibited if laid on land, then the States, which are prohibited from taxing imports and exports, and United States securities and offices under the General Government, might evade the prohibition by taxing the incomes of all these; and if they could tax them for their own use one per cent., they could tax them one hundred per cent. Says Chief Justice Marshall, in the case already referred to. (2 Peters, 449:)

"If the right to impose the tax exists, it is a right which, in its nature, acknowledges no limits. It may be carried to any extent, within the jurisdiction of the State or corporation which imposes it, which the will of each State and corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods, for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty, of the whole may depend, may be burdened, if not arrested, by any of the organized parts of the confederacy."

And in another case Chief Justice Marshall says: "It is obvious that the same power which imposes a light duty can impose a very heavy one—one which amounts to a prohibition. * * If it is to be exercised at all, it must be exercised at the will of those in whose hands it is placed." (12 Wheaton, 436.) That "the power to tax involves the power to destroy," Judge Marshall places among "propositions not to be denied." (4 Wheaton, 316.) So says Daniel Webster: "A power of taxation, without fixed limits, and without guards, is a power to embarrass, a power to oppress, a power to expel, a power to destroy."

STATES COULD EXPEL THE GENERAL GOVERNMENT.

Grant to the States the right to tax United States securities by imposing a tax of one hundred per cent. on the income derived from them, and if the income tax is constitutional they have it, and what would such securities be worth in any rebellious State? Just as much as the bonds of the southern confederacy are worth to-day, and no more. Chief Justice

Marshall, speaking of the proposed tax on the income of the United States stocks, said: "It is a burden on the operations of Government. It may be carried to an extent which shall arrest them entirely." (2 p. 449.) Officers of customs are patriotic; but it is the oil of fat salaries which keeps the flame of their patriotism burning and bright. Let a State levy a tax of one hundred per cent. on the income of these officers, and would there be such a strife as there now is for the privilege of serving the Government? Is it not plain that if you establish a distinction between the right to tax a thing and the right to tax its income, a distinction without which the income tax is void, you place the credit and the power of the General Government at the mercy of the separate States? Any disaffected State, by a system of taxation upon the incomes derived from offices under the General Government within its own limits, upon incomes derived from imports and from exports, amounting, if need be, to the sum total of such incomes, could virtually expel the General Government from its territory, and substantially accomplish all the injury which would attend its formal withdrawal from the Union. South Carolina, in the time of nullification, wished to throw open the port of Charleston to the free importation of goods. She wanted to escape the tariff, but knowing that she did not possess sufficient military and naval force to keep the port of Charleston open, she prudently desisted. If the distinction between taxing a thing and taxing its income, now attempted by Congress in the income tax, is law, how easily, by a tax of one hundred per cent. on the incomes of all United States officers, could she have banished these troublesome representatives of the General Government from her borders, and the very odor of the tariff with them. Or suppose she had said, if she could not have goods free, she would not have them at all. In addition to the tax upon the incomes of officers, she would only have had to impose a tax of one hundred per cent. on all incomes derived from imports and all incomes derived from exports to establish the most complete blockade imaginable. Erect the principle which underlies the unapportioned income tax, without which it cannot be maintained, and any disaffected State can paralyze the authority of the General Government within the limits of its own jurisdiction. And what disaffected States would do, if they could match the will with the power, is it not written on the battle-fields of the rebellion? The brain of Calhoun, racked upon the subject for a quarter of a century, was impotent to invent any doctrine so fatal to the existence of the Government. The Union

which the sword could not divide, which a million of fighting men could not tear asunder, will be seen, by the inexorable logic of such a law, without the aid of sabre or cannon, of cavalry or infantry, silently but certainly fall to pieces. If this is constitutional law, Jefferson Davis may linger in his prison or roam abroad on his bail bond; but his cause will have triumphed. He will have found in the author of the income tax an unconscious but a more successful ally than he had in Robert E. Lee. State sovereignty over the national power will be fully established, not, it is true, temporarily by rebel cannon, but permanently by Republican legislation. On the whole, considering by whom the income tax is principally paid, and that to maintain its constitutionality we must practically concede the whole doctrine for which the rebellion was waged, it seems to me, as a political and party measure, equal in brilliancy to an appropriation of loyal money by a loyal Congress for the support of the rebel armies.

ERRONEOUS NOTIONS OF THE ORIGIN OF THIS PROVISION.

It has been contended that the provision of the Constitution, that direct taxes shall be apportioned to population, grew out of the institution of slavery, and that, the reason of the law having ceased, the law should cease also. I know not whence those who advance this opinion derive their information. *The apportionment of taxation to numbers existed under the old confederation, when the representation of the States was equal*—that is, when one State was allowed just as many members of Congress as another, every State being entitled to seven. It was adopted in an amendment to the original Articles of Confederation; and the committee, consisting of Mr. Madison, Mr. Ellsworth, and Mr. Hamilton, appointed by Congress to recommend it to the States, say in their address: "This rule, though not free from objections, is liable to fewer than any other that could be devised."

REASON OF THE RULE.

The same reason which led to the adoption of this rule under the old confederation caused its preservation in the Constitution, which was that it was considered the most just and equitable rule for the apportionment of taxes that could be made. The debates in the Federal Convention show this. When the question of the best mode of apportioning taxes was under discussion, Roger Sherman, of Connecticut, said he "thought the number of people alone the best rule for measuring wealth as well as representation." (Elliot's Debates, v., 297.) Mr.

Gorham, of Massachusetts, "supported the propriety of establishing numbers as the rule." He said that in Massachusetts estimates had been taken in the different towns, and that persons had been curious enough to compare these estimates with the respective numbers of people, and it had been found, even including Boston, that the most exact proportions prevailed between numbers and property." *Ibid.*, 300.) Mr. Wilson, a leading member from Pennsylvania, said: "He had estimates from the western settlements of Pennsylvania, and on a comparison of them with the city of Philadelphia could discover little other difference than that property was more unequally divided here than there. Taking the same number in the aggregate, in the two situations, he believed there would be little difference in their wealth and ability to contribute to the public wants." (*Ibid.*, 301.) Dr. Johnson, of Connecticut, "thought that wealth and population were the true, equitable rules of representation; but he conceived that these two principles resolved themselves into one, population being the best measure of wealth." (*Ibid.*, 303.) And when the vote came to be taken in the Federal Convention on the proposition that direct taxation ought to be proportioned to representation, it passed without opposition. (*Ibid.*, 302.) The attention of those who have supposed that this provision of the Constitution was adopted wholly to promote the interests of slavery is invited to the historical fact, that when the first direct tax was under discussion in Congress, southern members —conspicuous among whom were James Madison and George Nicholas, of Virginia—insisted with unyielding pertinacity that the tax should be laid on slaves as well as upon land.

PROPORTION OF DIRECT TAXES MUST BE EXACT.

The framers of the Constitution intended that the apportionment of direct taxes among the States should be in more exact ratio to the population even than it is possible to apportion the representation. For example: Suppose one representative to every 90,000 inhabitants: a State might have a large fraction left over; but the apportionment of direct taxes was designed to be with mathematical accuracy to the precise number of persons ascertained by the census. After the first apportionment of representatives had been made in the Federal Convention, by estimated population, before an actual census, it was held that the estimate of the population of the different States was not sufficiently accurate for the apportionment of a direct tax; and that, consequently, the General Government could not lay a direct tax until a census

should have been taken. Elbridge Gerry, of Massachusetts, moved that until a census be taken, direct taxation be apportioned to the number of representatives. Mr. Carroll, of Maryland, replied that "*the number of representatives did not admit of a proportion exact enough for a rule of taxation.*" (Elliot's Debates, v., 451.) Mr. Ellsworth "thought such a rule unjust." There was a great difference between the numbers of inhabitants as a rule in this case. Even if the former were proportioned as nearly as possible to the latter, it would be a very inaccurate rule. A State might have one representative only that had inhabitants enough for one and a half or more, if fractions could be applied." (*Ibid.*, 453.) Mr. Gerry's motion was defeated. The convention, after debate, *decided that direct taxes must be apportioned in the States in more exact ratio to the population than the representation could possibly be apportioned.* (Elliot, v., 453.)

Many of the leading patriots of the Revolution—Patrick Henry among them—were distrustful of granting this power, even with the restriction placed upon its exercise. Massachusetts accompanied her adoption of the constitution with a resolution signed by John Hancock, whose name heads the list of signatures to the Declaration of Independence, recommending an amendment of the Constitution which should prohibit Congress from levying a direct tax until they should first have made a requisition on the States. (1 Elliot, 323.) The same amendment, word for word, was recommended by the State of New York and the State of North Carolina, and similar resolutions were adopted by South Carolina, and Rhode Island, and Virginia.

In the apportionment of the direct taxes, which had been laid by Congress previous to the income tax, the ratio to the census had been preserved with scrupulous accuracy. The actual use of the authority up to the time of the imposition of the income tax was in accordance with the understanding of the framers of the Constitution. Thus we see with what nicety the direct tax of $20,000.000, approved *August* 5, 1861, was apportioned. The ratio of New York is thus stated: "To the State of New York, $2,602,918.$\frac{3}{5}$"

INJUSTICE TO NEW YORK.

In 1850 the apportionment of representation was changed. The principles of a report on the subject, made several years previously in Congress by Daniel Webster, were adopted, and by their application, the relative representation of New York in the United States House of Representatives was reduced,

to make it more accurately proportioned to her population. Thus we perceive that,

1. The comparative representation of New York in Congress was reduced by the apportionment of 1850.

2. It will be greatly reduced by the increase about to take place in the representation of the southern States.

3. That while our comparative representation is subjected to such a reduction, the proportion of direct taxes levied upon the State has been more than doubled. In order to render this kind of legislation constitutional, an amendment to the Constitution would be required, to read as follows; "Representatives and direct taxes shall be *disproportioned* to each other!" In the apportionment of the direct tax of 1798, the sum put down to the State of New York was $181,680 70 7-10; and in that of 1813, $430,141 62. It will be seen that in laying all these direct taxes the requirements of the Constitution were observed, by apportioning them strictly according to the census, even to the fraction of a dollar.

THE ABOLITION OF SLAVERY NO REASON FOR CHANGING THE RULE.

The abolishment of slavery, so far from removing the reason for apportioning direct taxes to population, creates an additional cause why the northern and western States should insist on adhering to it. The former slaves, only three-fifths of whose number was reckoned in apportioning representation, are now counted in full, the same as other persons, and the former slave States will gain by this change a large increase of representatives. Their proportion of direct taxes should be increased correspondingly, unless it is proposed to give the colored man the ballot and at the same time exempt him from taxation; to make him not the equal of the white, but his superior; not merely "a man and a brother," but a man and a master.

REBEL STATES DO NOT PAY.

The unapportioned income tax is as unequal and unjust in its operation as it is unlawful in principle. Its burden rests almost entirely upon the loyal portion of the country, as if it were designed as a punishment for patriotism and a reward, by way of pecuniary exemption, for treason. The ten rebel States—Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Louisiana, Mississippi, Arkansas, and Texas—these ten paid of the tax collected in 1866 less than 1 per cent, of the whole amount of the income tax. The

eighth congressional district of New York paid $5,350,751 49. Mississippi, the State of Jefferson Davis, paid, all told, the enormous sum of $60, no fractions. At this rate the payment of the national debt, by an unapportioned income tax, would be just as easy, so far as the part of the rebel States is concerned, as repudiation. It is true that last year the rebel States did a little better; and for my own part I cannot severely blame them, because they do not contend, as for a prize, for the privilege of paying a tax, the principle of which was held to be unconstitutional when South Carolina put it to the test. And not until some new principle of human nature, never yet discovered, shall be evoked, will men manifest extreme alacrity to pay for being whipped. Heavy blows subjugate, but they can hardly be expected to quicken the conscience to a lively sense of pecuniary obligation for the expense of dealing them.

NEW YORK WRONGED OUT OF ELEVEN MILLION DOLLARS IN ONE YEAR.

The income tax paid by the eighth congressional district of New York in the year ending June 30, 1867, amounted to $5,495,676 04. The income tax paid by the State of New York for the same year was $20,085,507 71. This is more than double the amount that the State would have had to pay had the tax been apportioned to the census, as required by the Constitution. By an unconstitutional law a sum amounting to over ELEVEN MILLION OF DOLLARS more than the just proportion was taken from the pockets of citizens of the State of New York in the year 1867. That was the third year of this measure of injustice. And yet, during all the years that it has been perpetrated, the State has remained dumb on the subject on the floor of Congress—voiceless in the Senate, and voiceless in the House of Representatives!

During the rebellion there was naturally a strong disposition to acquiesce in the measures of the Government. This arose from noble and patriotic impulses. War has it own laws; but their sombre shadow should not be permitted to rest on the Constitution in time of peace. The feeling of patriotism which sanctions unconstitutional legislation, merely because it follows a patriotic war, is as blind as the sentiment of reverence when it leads to the worship of idols and to human sacrifice.

IT CONCERNS THE WHOLE PEOPLE.

This matter concerns the poor as well as the rich. If the rights of property can be invaded with impunity and in defi-

ance of constitutional law, the freedom of the citizen will not long remain secure. Rights of property and rights of person are inseparable; they exist or perish together. A slave who does not own himself cannot own any property. And just in proportion as a government renders insecure the fruits of a man's labor, whereby he maintains his life and his independence, it reduces him towards the condition of a slave. Whenever the Constitution fails to prove an impenetrable shield to all those rights of property over which it extends, it will cease forever to yield protection to liberty. In the Constitution it is written, as plainly as the Ten Commandments are written in the Bible, that no capitation or other direct tax shall be laid, unless in proportion to the census. The income tax is a direct tax, and is not laid in proportion to the census. It only remains for Congress to repeal the tax, or to apportion it according to the census. A disposition has been manifested, in quarters where statesmanship was to be expected, to speak slightingly of the Constitution as a mere bit of parchment. Let it be borne in mind that, parchment though it be, it is the only foundation of our Government. The simple adoption of this parchment Constitution by the thirteen original States was the only act of formation of the present Union. The Constitution breathed into this nation the breath of life. But for the authority derived from it we had no right, either legal or moral, to wage our recent war and to crush the rebellion. The Constitution is the Government. So believed Abraham Lincoln. When he had taken the Presidential oath to "preserve, protect, and defend the Constitution," he said, "I have the most solemn oath registered in heaven to preserve, protect, and defend the Government;" and so highly did the State of New York approve this interpretation of the oath, that she caused it to be painted in large letters, stretching across the whole width of her Assembly Chamber above the portrait of Washington, that it might confront the sight of her representatives forever.

Remember, O Congress! while the President of the United States stands arraigned at the bar of the Senate, impeached by the House of Representatives for the violation of law, the corner-stone of the Constitution, pried away by an act of legislation, still remains out of place.

W. O. Bartlett.

Hoffman House, New York, *March*, 1863.

NOTES ON THE CARRIAGE CASE.

Hylton *agt.* The United States, (3 Dallas, 171.)

It is undoubtedly to the loose *dicta* of the judges in this case, to the effect that a capitation tax and a tax on land are the principal, if not the only, direct taxes within the meaning of the Constitution, that the general acquiescence in the unapportioned income tax is, in a great degree, attributable. The case was as follows: Hylton kept 125 chariots; they were taxed by the United States, and the Supreme Court held that the tax was indirect, and did not require to be laid according to the rule of apportionment. The decision of the particular case before the court was probably correct. It is impossible that a man could have kept so many carriages for himself and his family only to ride in; and, although he is stated in the report of the case to have kept them for his own use, it is presumed that the use referred to was the conveyance of passengers for hire—in other words, that the 125 chariots pertained to a line of stage-coaches. If this was the fact, the tax was indirect; for the tax-payer could charge it all over to his passengers by making a slight addition to their fare. But although the decision of the case before the court appears, for the reason stated, to have been correct, positions were taken, in the opinions of the judges delivered on the occasion, which are wholly untenable.

It is assumed, though Judge Chase is careful to disclaim giving a judicial opinion on that point, "that the direct taxes contemplated by the Constitution are only two, to wit, a capitation or poll tax simply, without regard to property, profession, or any other circumstance, and a tax on land."

Judge Patterson first struck the Constitution squarely in the face, by declaring that "the rule of apportionment * * * is radically wrong; it cannot be supported by any solid reasoning." He then went on to comment on the observations of counsel, "*that Congress may select, in the different States, different articles or objects from which to raise the apportioned sum,*" and he said "*the idea is novel.* What! shall land be taxed in one State, slaves in another, carriages in a third, and horses in a fourth, or shall several of these be thrown together, in order to levy and make the quotaed sum? *The scheme is fanciful.*"

Judge Iredell said: "Such an arbitrary method of *taxing different States differently is a suggestion altogether new.*"

Point-blank against these assertions I oppose the statements of the men who made the Constitution, and who fully explained

its meaning. In the debate on the provision of the Constitution relating to direct taxation, in the Federal Convention, Oliver Ellsworth said: "The sum allotted to a State may be levied without difficulty, according to the plan used by the State in raising its own supplies." (5 Elliot's Debates, 305) Mr. Ellsworth was not only a member of the Federal Convention, but he was one of the committee of detail appointed by the convention to draft the Constitution. He had been a member of Congress under the Confederation, and participated in the important debates in that body on the subject of taxes. In the above lucid explanation of the intention of this clause in the Constitution, he was, in fact, only giving an authoritative interpretation of the true meaning of his own well-considered language—his own and that of the other learned men on the committee of detail with him. On the morning of the very day upon which this case was decided, Mr. Ellsworth was sworn in as Chief Justice of the Supreme Court of the United States. Had he participated in the proceedings he might have concurred in the decision, but it would have been impossible for him to acquiesce in the *dicta* of the judges, for they were in direct contradiction to the proceedings of the Federal Convention, and to his own official exposition of the meaning of this provision of the Constitution; but he excused himself from taking any part, on the ground that he had not heard the arguments in the case.

What were the plans used by the different States at that time in raising their own supplies, according to which Mr. Ellsworth said direct taxes, under the Constitution, could be imposed? They were very dissimilar in different States. In New York, Rhode Island, and Maryland they were imposed on the mass of property, real and personal, with certain exceptions. In some States all the stock of farms was taxed; in others it was not taxed at all; while in others still a part of the stock was taxed—as horses, in Virginia; and in some other States horses and cattle. *In Delaware the entire tax was upon income.* (Report of Oliver Wolcott, Jr., Secretary of the Treasury, on Direct Taxes, 1796.) In the Virginia convention which ratified the Constitution, Governor Randolph said of the direct tax by the General Government, "It must be clearly laid on the most productive article in each particular State. * * * Were the tax laid on one uniform article throughout the Union, its operation would be oppressive on a considerable part of the people." (3 Elliot's Debates, 121, 122.) Governor Randolph was on the committee with Mr. Ellsworth in the Federal Convention appointed to draft a con-

stitution. So we have two members of that committee—the committee who drew up the Constitution—making the same explanation of the clause about direct taxes, and that explanation at variance with the interpretation of the judges in the Hylton case.

The carriage case was decided at a very early day in the history of the Supreme Court, and before that court had acquired the high position in the estimation of the legal profession and of the public which it has since attained. One of the judges, in delivering his opinion, speaks of it himself as a "discourse;" they all evince great want of knowledge of the subject which they discuss. The crude speeches made from the bench in this case have acquired a degree of consideration which they do not intrinsically merit. They shine in the borrowed light shed back upon them by the great intellect which for so many years illuminated the decisions of that tribunal—the illustrious Marshall—with whose grandeur of fame we naturally associate all ideas of the Supreme Court.

Fortunately, however, we have the opinion of John Marshall on this provision of the Constitution. It was expressed very fully in the Virginia convention called to ratify the Constitution, and it accords with that of Mr. Ellsworth and that of Governor Randolph, and is entirely at variance with the views which I have criticized of the judges in the Hylton case.

In the debate on the provision relating to direct taxes James Monroe had asked: "What are the objects of direct taxation? * * * Will the taxes be laid on land? * * * A very considerable part of the community would escape. * * * What is the extent of the power of laying and collecting direct taxes? *Does it not give to the United States all the resources of the individual States?*" (3 Elliot's Debates, 215, 216.) Judge Marshall said, in answer: "*Where is the absurdity of having thirteen revenues? Will they clash with or injure each other? If not, why caunot Congress make thirteen distinct laws, and impose the taxes on the general objects of taxation in each State, so as that all persons of the society shall pay equally, as they ought?*" (*Ibid*, 235.)

In addition to the opinions thus clearly expressed by Ellsworth and Marshall, who held successively the office of Chief Justice of the Supreme Court of the United States, I will cite another name, which must be regarded as second to none as an authority for the true interpretation of the Constitution, and that name is James Madison. Of him Daniel Webster said, in a speech delivered in this city in 1831:

"If ever man had the means of understanding a written in-

strument, Mr. Madison has the means of understanding the Constitution. If it be possible to know what was designed by it, he can tell us. Having been afterward, for eight years, Secretary of State, and as long President, Mr. Madison has had an experience in the affairs of the Constitution certainly second to no man. More than any other man living, and perhaps more than any other who has lived, his whole public life has been incorporated, as it were, into the Constitution; in the original conception and project of attempting to form it, in its actual framing, in explaining and recommending it by speaking and writing, in assisting at the first organization of the Government under it, and in a long administration of its executive powers—in these various ways he has lived near the Constitution, and with the power of imbibing its true spirit and inhaling its very breath from its first pulsation of life. Again, therefore, I ask, if he cannot tell us what the Constitution is and what it means, who can?" (Works of Daniel Webster, I., 203, 204.)

Mr. Madison followed John Marshall in the debate, and he said:

"It has been said that ten men, deputed from this State and others in proportion from other States, will not be able to *adjust direct taxes so as to accommodate the various citizens in thirteen States.* I confess I do not see the force of this observation. * * * They will be perfectly well informed of the circumstances of the people of the different States, and the mode of taxation that would be most convenient for them, from the laws of the States. *In laying taxes, they may even refer to the State system of taxation.* * * * My honorable friend over the way (Mr. Monroe) yesterday seemed to conceive, as an insuperable objection, that if land were made the particular object of taxation, it would be unjust in discharging the landholders, and that any exclusive selection would be unequal and unfair. *If the General Government were tied down to one object, I confess the objection would have some force in it.* But if this be not the case, it can have no weight. If it should have a general power of direct taxation, *they could select the most proper objects*, and distribute the taxes in such a manner as that they should fall in a due degree on every member of the community. They will be limited to fix the proportion of each State, but they must raise it in the most convenient and satisfactory manner to the public." (*Ibid*, 253, 254, 255.)

On a subsequent day Mr. Madison said:

"*The most proper articles will be selected in each State. If*

one article in any State should be deficient, it will be laid on another article." (*Ibid*, 307.)

Patrick Henry pointedly asked:

"Does the honorable gentleman mean that the thirteen States will have thirteen different tax laws?" (*Ibid*, 327.)

Mr. Madison, in reply, said:

"It has been amply proved that the General Government can lay taxes as conveniently to the people as the State governments, *by imitating the State systems of taxation.*" (*Ibid*, 329.)

And Mr. George Nicholas, also in reply to Mr. Henry, said:

"Had taxes been uniform, it would have been universally objected to; for *no one object could be selected without involving great inconveniences and oppressions.*" (*Ibid*, 457.)

Mr. George Mason remarked, that

"The General Government was not precluded from laying the proportion of any particular State on any species of property they might think proper." (*Ibid*, 459.)

Mr. Madison replied:

"The census in the Constitution was intended to introduce equality in the burdens to be laid on the community. No gentleman objected to laying duties, imports, and excises uniformly. But *uniformity of taxes* would be subversive of the principles of equality, for it was not *possible to select any article which would be easy for one State but what would be heavy for another;* that the proportion of each State being ascertained, it would be raised by the General Government in the most convenient manner for the people, *and not by the selection of any one particular object.*" (*Ibid*, 458.)

It is conclusively proved by the authorities which I have cited, that the declarations of the judges in the Hylton Case, were entirely errroneous. They say that the idea that different objects may be taxed in different States is "novel," and that the scheme is "fanciful." If the idea was novel to the judges, it must have been because they never read the debates on the Constitution, or, if they had read them, they must have forgotten them. And if, as Judge Patterson thought, "the scheme is fanciful," it must be admitted that it was the fanciful scheme of such men as Chief Justice Ellsworth, Chief Justice Marshall, Edmund Randolph, and James Madison.

If the provision in the Constitution that direct taxes shall be apportioned among the several States according to their respective numbers, means, as intimated by the judges in the Carriage Case, only that capitation taxes and taxes on land

should be so apportioned, then it is apparent, from the extracts which I have made from their speeches, that Oliver Ellsworth, Edmund Randolph, James Madison, John Marshall, George Nicholas, George Mason, and Patrick Henry did not understand the true meaning of the Constitution, or that they did not truly explain its meaning at the time it was framed and adopted. If the judges in their *dicta* in the Hylton Case were right, all these men must have been wrong; and if these men were right in their understanding of the Constitution, then clearly the judges in their *dicta* were wrong. The practice of Congress in levying direct taxes has been opposed to the doctrines of the judges in the Hylton Case.

April 4, 1796, the House of Representatives adopted a resolution directing the Secretary of the Treasury to "report a plan for laying and collecting direct taxes, by apportionment among the several States, agreeably to the rule prescribed by the Constitution, *adapting the same* as nearly as may be *to such objects of direct taxation as may appear by the laws and practice of the States respectively to be most eligible in each.*" (Am. State Papers, v., 414.) And the direct taxes of 1798 and 1813 included a tax on slaves, a species of personal property then existing in only a part of the States.

It may be said further, that while the decision in the particular case of Hylton can be sustained on sound principles, yet a tax on carriages is not necessarily and in all cases an indirect tax. Judge Chase argues that all taxes on expenses are indirect taxes, and that a tax on carriages is of this kind. But it is not true that *all* taxes on expenses are indirect taxes. *Many* of them are, but not *all*. And it is never *because* they are taxes or expenses that they are indirect. A tax is indirect, when it is levied so that the person who pays it can charge it over to some one else. This is the case with many taxes on expenditures, but by no means with all. Take, for example, the article of soap. Suppose the Government puts a tax of one shilling on every bar of soap. The manufacturer pays it and charges it, with probably a slight addition, to the grocer; the grocer charges it also, probably with a slight addition, to the consumer. Now, every housekeeper in the country understands at once that this tax is ultimately paid by the consumer. As levied on the soap in the hands of the manufacturer for sale, it is consequently indirect. He, in reality, is merely made a collector for the Government of so much of its revenue. But suppose a *housekeeper manufactures his own soap*, as *many people in the country do*. The Government compls him to pay a tax of a shilling on every bar; that *is a direct tax*. *He can-*

not charge it over to anybody. A tax on carriages, when imposed on carriages in the hands of *the manufacturer for sale, is indirect*, because the manufacturer charges it immediately over to the purchaser. A tax on carriages in the hands of a stage-coach proprietor—a common carrier of passengers for hire—is indirect, because the tax-payer charges it over to his passengers, by making a slight addition to their fare. *But if a person who keeps a carriage exclusively for his own use is compelled to pay a tax on it, the tax is direct;* just as direct as if it were a tax on the horses which haul the carriage, on the grain which the horses eat, or on the land on which the owner raises the grain for his horses. I suppose it is in this point of view that John Stuart Mill declares a *tax on carriages* to be a *direct tax*. He says: "Most taxes on expenditure are direct, being imposed, not on the producer or seller of an article, but immediately on the consumer. * * The window tax is a direct tax on expenditure; so are taxes on horses and carriages." (Political Economy, vol. ii, p. 371.) And James Madison regarded the carriage tax of 1794 as tending toward the subversion of the Constitution and the establishment of a monarchical government. (4 Elliot, 550.)

A great part of Judge Chase's remarks on the Hylton Case are leveled against *the system of apportioning any direct tax*, and consequently against the theory and spirit as well as the letter of the Constitution. The judge was subsequently impeached.

W. O. BARTLETT.

HOFFMAN HOUSE, NEW YORK, *March*, 1868.

United States Supreme Court.

THE PACIFIC INSURANCE CO.

vs.

FRANK SOULE,
Collector of Internal Revenue.

This case comes up on a certificate of division of opinion between the learned judges of the United States Circuit Court for the late Tenth Circuit.

POINT I.

It was clearly the object of the last subdivision of the ninth section of the Act of Congress of July 13, 1866, (*Stat. at Large for* 1865–6, *p.* 147) to compel parties to pay the legal percentage on their incomes, estimating them at their value in legal tender currency. If the reduction of all incomes to a legal tender standard was intended for no other purpose than to establish a uniform system in keeping the accounts of the internal revenue department, it is difficult to understand, *first*, why, in case of refusal to declare in which currency the income return is made, the Assessor should be entitled to disregard the return, and exact, over and above the regular income tax, a *penalty* of twenty-five per cent.; and, *secondly*, why "the lists required by law to be furnished to Collectors by Assessors" are required "in all cases to contain the several amounts of taxes assessed, estimated or valued in legal tender currency only?" If the Collector's lists are to contain these amounts, these are the

amounts to be collected and paid. This is evident from other provisions of the internal revenue law. Thus, by section 20 of Act of June 30, 1864, as amended by Act of July 13, 1866, (*Stat. at Large for* 1865–6, *p.* 103) as soon as the assessment has become perfect, the Assessor is to make out the list and send it to the Collector, and this list is the guide of the Collector in the collection of the tax ; and by section 34 of same Act, as amended, (*Stat. at Large for* 1865–6, *p.* 110) the Collector is charged with the amount of taxes as stated on the face of the lists, and credited with the amount of his collections.

The Collector's duty is plain and simple : to collect the amount set forth in the assessment list. The corresponding duty of the party taxed is equally clear—namely : to pay this amount.

The language of the law is in entire harmony with the obvious intention of those who framed it, which was to adopt one uniform standard for the computation, assessment and payment of taxes of this description.

POINT II.

It is difficult to see how the learned Judge who held the affirmative of the proposition—that the law of July 13, 1866, required that the difference between coined money and legal tender money must be added to the return when made in coined money, and that the party must pay the tax or duty upon the amount thus assessed—could also hold that the second, third, fourth and fifth questions set forth in the certificate "occurred" in this case. For, taking the affirmative of the proposition just stated as correct, and applying it to the conceded facts of the case, the only question presented (independently of those numbered six and seven) is, whether a tax legally assessed against the plaintiff amounting to $7,365, could be satisfied by the payment of $5,836.

This second question presupposes that the Government of the United States has a demand against the

plaintiff for a certain number of dollars, and that the plaintiff tendered in payment Treasury notes representing the same number of dollars, which the Government refused to receive in satisfaction of the debt. The third, fourth and fifth questions proceed on this same implication. If, under the law of June 30, 1864, the debt or duty due on income is the sum arrived at by the Assessor as the result of the computation fixed by law, then it follows that the tax charged against the plaintiff was $7,365, and not $5,836, and the data implied in these questions have no existence in point of fact, but are purely hypothetical.

That the language of the law (before cited) requires the income return to be made in or reduced to legal tender currency, and the tax to be assessed thereupon in that currency, and that the result represents the sum payable by the party taxed, seems too clear to admit of doubt; and we concede that this sum representing legal currency is payable "dollar for dollar" in that currency. The difficulty of the plaintiff's case is, that he owes the Government $7,365 and proposes to satisfy it by paying only $5,836. The plaintiff's real objection is, that the Government will not permit him to make out his income return on the coin basis, but insists that it shall be reduced to legal tender currency. The point at issue is, whether he or the Government shall prescribe the rule by which his income tax is ascertained and assessed.

The Act of July 11, 1862, (12 *Stat. at Large, p.* 532) confers no such right as is claimed by the plaintiff in this suit. By the first section of that Act, these legal tender notes are receivable in payment of all taxes, internal duties, excises, debts and demands of every kind, except duties on imports and interest, and of all claims and demands against the United States, except for interest upon bonds, notes and certificates of debt or deposit; and are also lawful money and a legal tender in payment of all debts, public and private, within the United

States, except duties on imports and interest as aforesaid. The tax due from the defendant in this case was $7,365.68, which the defendant refused to pay otherwise than by a tender of $5,836.75 in legal tender currency. The tax was not ascertained until the assessment was completed, and the assessment showed a tax, debt or duty due to the Government of $7,365.68, which the defendant was ordered to collect, and which the Government was prepared to discharge on payment of that sum in legal tender notes. The statement of per centage in coin of $5.836.75 was only one of the data from which the Assessor proceeded to complete the assessment. Acting in conformity with the law, he computed the defendant's tax and assessed it to him at $7,365 08-100. Those figures represent the only income tax or duty he is called upon to pay.

The plaintiff either owes the Government the sum assessed against him, or he owes it nothing. If he could not be assessed according to the legal tender standard, he could not be assessed at all, as the law directs that that basis shall be adopted in taxing incomes, and thereby necessarily excludes all others. That he must pay according to his assessment, seems too plain for dispute. If assessed, therefore, in legal tenders, he must pay such an amount in lawful money of the United States as will satisiy the assessment.

It is clear that the plaintiff has been assessed according to law, provided the law be constitutional. But what objection can be urged against the power of Congress to compel all parties in making their returns to state their income, not in coined dollars, but in dollar Treasury notes? These notes are now of less value than gold. It is conceivable that they may one day be above par. Suppose the United States Government, in that case, should still adhere to its present system of computing the income tax, and should require payment in Treasury notes instead of coin. There is no

constitutional prohibition against collecting taxes in anything besides gold and silver. Congress might doubtless have required income returns to be stated in gold coin values, and the tax assessed thereon in coin, and might then have compelled the party owing the tax to disburse the amount in the purchase of legal tenders, and pay the same to the Collector in satisfaction of the debt. They have accomplished substantially this same result by a less circuitous and more convenient mode of proceeding, and one equally free from any legal objection.

POINT III.

The tax on incomes is not a "direct tax" within the meaning of the Constitution, and is not subject to the rule of apportionment prescribed by article I, section 2, of the Constitution. The principle on which the tax is levied is incompatible with the idea of apportionment. On the principle of apportionment according to representation, each inhabitant of the State would pay in proportion to the ratio which the population of his State bears to the population of all the other States; while on the principle of the income tax law, each resident in the United States pays in proportion to his income without reference to any other consideration. To say, therefore, that the income tax must be levied according to the rule of apportionment, is to deny Congress the power of levying any income tax. An *income* tax assessed not according to income, but according to the ratio borne by the population of the State in which the party taxed resides to the population of the other States, is a contradiction in terms.

The case of *Hylton* vs. *United States*, 3 Dallas, 171, seems conclusive on the point here raised.

POINT IV.

It is respectfully submitted, that the only real questions presented by the certified statement are the following:

1st. Was the assessment made and perfected according to law?

2d. Is the mode of levying the tax in conflict with subdivision 3 of section 2 of article I of the Constitution?

U. S. Attorney-General.